MCMLXIV

Office of the Chairman
Administrative Conference of the United States

Administrative Conference of the United States

Recommendations and Reports

1994-1995

Indexed Bibliography
1968-1995

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

Office of the Chairman
Administrative Conference of the United States

Administrative Conference of the United States

Recommendations and Reports

1994-1995

Cite as:
1994-1995 ACUS______

CONTENTS

RECOMMENDATIONS of the Administrative Conference of the United States

Recommendation 94-1: The Use of Audited Self-Regulation as a Regulatory Technique 1

Recommendation 94-2: Reforming the Government's Procedure for Civil Forfeiture 5

Recommendation 95-1: Application and Modification of Exemption 8 of the Freedom of Information Act 9

Recommendation 95-2: Debarment and Suspension from Federal Programs 17

Recommendation 95-3: Review of Existing Agency Regulations 27

Recommendation 95-4: Procedures for Noncontroversial and Expedited Rulemaking 31

Recommendation 95-5: Government Contract Bid Protests 39

Recommendation 95-6: ADR Confidentiality and the Freedom of Information Act 45

Recommendation 95-7: Use of Mediation under the Americans with Disabilities Act 49

Statement 17: Comments on the Social Security Administration's Proposal on Reingineering the SSA Disability Process 55

REPORTS for Recommendations

Rec. 94-1: Douglas C. Michael. *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique* 65

Rec. 94-2: Arnold H. Leibowitz. *Civil Forfeiture: The Issues and Some Recommendations* 175

Rec. 95-1: Roy A. Schotland. *Reexamining the Freedom of Information Act's Exemption [8]* 211

Rec. 95-2: Brian D. Shannon. *Debarment and Suspension Revisited: Fewer Eggs in the Basket?* 305

Rec. 95-3: Sidney A. Shapiro. *Agency Review of Existing Regulations* 407

Rec. 95-4: Ronald M. Levin. *An Introduction to Direct Final Rulemaking* 443

Rec. 95-4: Michael R. Asimow. *Interim-Final Rules* 477

Rec. 95-5: William E. Kovacic. *The Choice of Forum in Bid Protest Disputes* 507

Rec. 95-6: Mark H. Grunewald. *The Freedom of Information Act and Confidentiality under the Administrative Dispute Resolution Act* 557

Rec. 95-7: Ann C. Hodges. *Dispute Resolution under the Americans with Disabilities Act* 581

INDEXED BIBLIOGRAPHY

Administrative Conference of the United States: A Bibliography 1968-1995 663

Note: There was no background report for Statement 17.

RECOMMENDATIONS 94-1 THROUGH 95-7
AND
STATEMENT 17

Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/adminconf199495unse

Recommendation 94-1

The Use of Audited Self-Regulation as a Regulatory Technique

Audited self-regulation is defined as congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency. This self-regulatory organization is often an association of regulated entities formed for the explicit purpose of self-regulation. Audited self-regulation is an alternative for Congress to consider in legislating any regulatory program. Properly implemented and monitored, a program of audited self-regulation may effectively advance the statutory objectives consistent with the public interest and the interests of the regulated entities.

In certain circumstances, this approach may result in better regulation because the agency's statute and rules are supplemented and enforced by those entities directly involved in the regulated activity, which may have more detailed knowledge of the operational or technical aspects of that activity. The regulatory program also may be more effective because it can be tailored to the individual industry or group. In addition, the agency's regulatory enforcement costs may be reduced by this approach, although such cost reductions should be considered only if they can be achieved without eroding the effectiveness of enforcement.

On the other hand, audited self-regulation may present the significant risks of uneven enforcement, capture of the regulators by the regulated industry, and creating barriers to entry or competition. Where the potential for institutional self-interest is too great, self-regulation is undesirable. Other risks can be lessened by requiring the self-regulatory organization to establish and follow procedures similar to those that would be applicable if the self-regulatory organization were an agency.[1] For these procedures to work, effective interest groups must exist, and must have access to the agency, to raise concerns about the conduct of the self-regulatory organization. And of course, the agency itself must vigilantly oversee the activities of the self-regulatory organization and of the regulated entities themselves.

---

[1] Such procedures generally provide for public participation and require all points of view to be taken into account and addressed. For example, rulemaking ordinarily should provide notice and opportunity for comment to all affected parties, and adjudications should be open to the public and include notice and hearing safeguards.

A survey of agency experience with audited self-regulation[2] reveals several common elements typically present in effective programs: (1) industry members are organized, expert, and motivated to comply; (2) the regulatory program requires individualized application of clear rules that can be objectively applied; and (3) the agency itself has sufficient expertise to audit the self-regulatory activity effectively. The survey also revealed that audited self-regulation programs that were terminated or not implemented lacked at least one of these elements.

In those cases where the prerequisites and safeguards discussed above are present, Congress and the agencies should consider audited self-regulation as a regulatory technique.[3]

RECOMMENDATION

1. Congress and agencies should consider audited self-regulation as a regulatory technique when designing, revising, or reevaluating regulatory programs, but only where it can be effective, as specified in Paragraph 2 below, and only where it can operate fairly, as specified in Paragraph 3 below. Audited self-regulation is defined as congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency.

2. Effectiveness. Audited self-regulation can be effective if it meets the following requirements.

a. The substantive standards, whether imposed by statute, regulation, or otherwise, are clearly stated and are capable of objective application, even if judgments must be made in applying them.

b. A self-regulatory organization with the ability and incentive to implement these substantive standards in cooperation with the agency exists or can be created.

i. Ability. The organization must have the expertise, experience, authority, and commitment to design, implement, and evaluate effective compliance measures. It must also, by itself or in combination with other self-regulatory organizations, have jurisdiction over all regulated entities.

---

[2] Audited self-regulation has been used in diverse programs, including quality of medical care under government insurance programs, stock exchange and commodities regulation and trading, agricultural marketing agreements, and certification of medical testing laboratories.

[3] Note, for example, that Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735, 51,736 (October 4, 1993) states that, to the extent permitted by law, agencies should identify and assess alternative forms of regulation.

ii. Incentive. The organization must be motivated to undertake effective and fair self-regulation consistent with the public interest, as that interest has been articulated by Congress and the agency. This motivation can be provided by, among other things: (A) the members' common incentives; (B) effective monitoring by groups that may be harmed by noncompliance; (C) potential legal liability of the self-regulated entities or the self-regulatory organization; or (D) the potential for direct government regulation.

c. The agency responsible for implementation and oversight must have the ability and incentive to implement the substantive standards through a self-regulatory program.

i. Ability. The agency must have (A) statutory authority, including at least the powers specified in Paragraph 2(d) below; (B) sufficient substantive expertise; (C) knowledge of organizational behavior and internal control procedures of the self-regulatory organization and its members; and (D) sufficient resources, including effective auditing capability to monitor compliance.

ii. Incentive. The agency must have the incentive to implement the self-regulatory program effectively. Effective implementation requires that the agency be committed to achieving the objectives of the statutory scheme through the self-regulatory program. It also requires that the agency consider the rights and needs of the intended beneficiaries of the regulatory program, who may be harmed by noncompliance, as well as the rights and needs of the regulated entities.

d. The self-regulatory program is expressly authorized by legislation that includes:

i. an explicit statement of the scope of permitted delegation to the self-regulatory organization;

ii. authority for the agency (A) to independently enforce the law, agency regulations, and rules of the self-regulatory organization relevant to the program; (B) to enforce the organic requirements of the self-regulatory organization against the organization, and require that the organization in turn enforce its own rules against its members; (C) to review all rules and enforcement actions of the self-regulatory organization relevant to the program; and (D) to amend, repeal or supplement the rules of the self-regulatory organization or require the self-regulatory organization to do so; and

iii. a requirement that the agency, in promulgating its own rules or reviewing the rules of the self-regulatory organization, examine the effects of those rules on competition.

3. Fairness. Audited self-regulation can operate fairly only if the procedures of the self-regulatory organization ensure that the decisionmaker is properly informed and unbiased. Procedures for adjudication and for establishing rules of general applicability should conform generally to those that would be followed if

the proceeding were conducted by the agency. In addition to the agency's plenary review authority referred to in Paragraph 2(d)(ii)(C), the agency should provide parties with a right of appeal.

4. Access to records and proceedings of the self-regulatory organization. Congress and the agency should provide public access to records of the self-regulatory organization relating to the organization's regulatory activities, to the extent such records would be available under the Freedom of Information Act if the self-regulatory organization were an agency. Congress and the agency also should consider whether to require any nonadjudicatory proceeding of the organization to be open to the public.

5. Alternative dispute resolution. The rules of the self-regulatory organization should provide for use of informal and consensual procedures to resolve disputes where appropriate.[4]

---

[4] The Administrative Conference has repeatedly encouraged agencies to use alternative dispute resolution and negotiated rulemaking techniques in appropriate circumstances. The same factors supporting those recommendations suggest the value of informal and consensual processes in the context of self-regulatory organizations. *See, e.g.*, Recommendations 82-4 and 86-3.

Recommendation 94-2

Reforming the Government's Procedure for Civil Forfeiture

The United States Government has in recent years made increasing use of its power to confiscate the property or assets of persons involved in illegal activities through the civil forfeiture process.

The law classifies forfeitures as criminal or civil according to the procedure by which the government perfects its title in the confiscated property. Criminal forfeiture follows as a consequence of criminal *conviction* of the property owner. The government cannot obtain clear title until a post-trial proceeding is held. Civil forfeiture is accomplished by civil proceedings, *in rem*, against the property itself. Civil forfeiture has numerous advantages over criminal forfeiture in that the property itself is the "defendant" in the suit, and the property may be forfeited even if the owner is dead or has fled the United States.

Over a hundred statutes authorize civil forfeiture, with most involving drug, racketeering, money laundering, or immigration violations.

A civil forfeiture begins with a "seizure" of a privately-owned property by the investigative/prosecutorial government agency. Constitutionally, the agency must meet the probable cause test showing that there are reasonable grounds for belief that the property has been used in the commission, or constitutes proceeds, of the crime.

Civil forfeiture proceedings are of two types. Congress has provided for *administrative* forfeiture in cases where the property is cash, the value of the property is under $500,000 or is a boat, plane or car used to carry or store drugs, or if the seizure goes uncontested. Notice of an impending administrative forfeiture is sent to the last known address of the owner and is published in newspapers.

A *Judicial* forfeiture proceeding is required when a claimant contests the seizure, when the property seized is real estate, and when the value of the seized property (other than cash) is over $500,000. If the case proceeds, it does so in federal district court where there is a right to a jury trial.

This recommendation addresses a few procedural issues regarding civil forfeiture.[1] Many other issues, both procedural and substantive, have been raised by courts and by critics of the forfeiture process.[2] There is a fundamental issue about the fairness and effectiveness of the entire administrative civil seizure/forfeiture process. It currently involves an extremely informal administrative process and, for the small proportion of judicial forfeiture cases that are taken that far, a trial in the federal district court.

After forfeiture, an owner may petition for remission (return) or mitigation (partial return) of the property. Of course, in many instances, especially those involving cash, no one claims ownership. According to federal common law, the authority to grant remission or mitigation is totally at the discretion of the seizing agency. A decision on the merits for remission or mitigation is non-reviewable by the judiciary.[3]

Notice. The current system of using newspaper notices of the proposed forfeiture action along with a letter to the last known address of the owner has been criticized as unduly expensive[4] and ineffective. The establishment of a centrally maintained Civil Forfeiture Registry, which would be published and made widely available, would not only provide better and more reliable notice, it would provide a better overview of the entire forfeiture process, thus improving public and congressional oversight.

---

[1] This recommendation only applies to seizures by agencies acting under the authority of statutory administrative forfeiture provisions. It does not apply to agency seizure of property under the authority of regulatory statutes that do not have administrative forfeiture provisions, or to seizure of property that by its nature is violative of the law, such as seizures under the Federal Food, Drug, and Cosmetic Act.

[2] Federal adoption of state forfeiture actions is one issue which has received recent scrutiny. Under the Comprehensive Crime Control Act of 1984, forfeited assets (property, or money derived from its sale) are allocated exclusively for law enforcement purposes rather than to the general Treasury. Additionally, the Department of Justice and the Customs Bureau gained authority to transfer forfeited property and cash to state and local agencies that directly participate in law enforcement efforts leading to seizures and forfeitures. This has led some officials in six states which require forfeited property to revert to the general state treasury, to ask federal officials to adopt state cases and convert them into federal forfeitures. The Department of Justice asset sharing program shared over $736 million in cash and $90 million in property with state and local agencies from the start of the program in fiscal year 1986 through fiscal year 1991. In *Harmelin v. Michigan*, the Supreme Court noted:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

501 U.S. 957, __, 111 S.Ct. 2680, 2693, n.9 (1991).

[3] Historically, the federal government has provided for administrative relief from forfeiture in cases where the party's conduct was undertaken "without willful negligence" or an intent to commit the offense. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 n.27 (1974), quoting 19 USC§1618.

[4] The Department of Justice estimates that the government spends over $5 million annually on newspaper notices.

Time Limits. At present, federal statutes provide no time limit on the agency to provide notice to the owner of the seized property. Unlike the requirements imposed on a person contesting the seizure to file a claim to the property, deadlines have not been similarly imposed on the agency within which it must commence a forfeiture action in district court. Current Department of Justice policy is to send a notice of seizure to each person known to have an ownership or possessory interest in the seized article within 60 days of the seizure. The notice triggers the running of the time specified by the enabling statute (usually 30 days) within which a person may file a claim to the property (thus converting an administrative forfeiture into a judicial one).

Congress should provide a statutory 60-day time limit on the agency to provide notice in the Civil Forfeiture Registry and to send written notice of a seizure to the last known address of the owner or interest holder in the property. Granting extensions or waivers of the 60-day notice requirement should be within the discretion of a federal judge or magistrate, upon a showing by the government of good cause. Failure to meet the filing time limit (absent a waiver or extension) should result in a return of the property pending further forfeiture proceeding.

1. Congress should provide for the establishment of a Civil Forfeiture Registry, centrally maintained, kept current, and made widely availble by the Department of Justice, in lieu of the current requirements to publish notices in specific locations or specific media. The Department of Justice should then maintain the Civil Forfeiture Registry to provide a well-known and continuing place for notifying owners of seized property about proposed forfeitures.

2. Congress should modify the forfeiture laws to require the government to publish notice in the Civil Forfeiture Registry and mail specific notice to the last known address of each person known to have an ownership or possessory interest in the seized article within 60-days following seizure, recognizing that extensions or waivers are available with appropriate safeguards against abuse. If the seizing agency fails to provide notice in the Civil Forfeiture Registry (absent good cause) or to the last known address of the party from whom the property was seized within the time limits, and no waiver or extension was granted, the seized article should be returned to the party pending further forfeiture proceedings.

Recommendation 95-1

Application and Modification of Exemption 8 of The Freedom of Information Act

Background

The Freedom of Information Act (FOIA), 5 USC section 552, generally mandates public access to records in the possession or control of federal agencies, whether the records are generated by the agency or obtained by it from other sources. The Act contains nine exemptions, each of which authorizes but does not require the agency to protect from disclosure certain types of information. Exemption 8 permits agencies responsible for the regulation or supervision of financial institutions to protect from disclosure matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of" the agency.

Exemption 8 provides an unusual level of protection to banks and bank regulatory agencies.[1] Except for Exemption 9, dealing with geological and geophysical information, no other FOIA exemption is industry- or agency-specific. In light of the change in the regulatory environment of financial institutions since the passage of the FOIA in 1966, the Conference has reviewed whether this broad exemption continues to be justified. The upheaval faced by financial institutions in the last decade and the number of such institutions that have failed makes availability of information relating to the regulation of that segment of the economy of particular interest. A substantial amount of taxpayer money has been spent to alleviate problems relating to financial institutions.

Exemption 8 covers a wide range of documents, primarily operating reports, condition reports, and examination reports of financial institutions. Operating and condition reports are largely public financial statements submitted by the bank to the agency, although they also may include some nonpublic information. Examination reports are the written statements prepared by the agency's examiners evaluating the bank's operations and practices, but they are not audit reports. Examination reports include, among other things, information about an institution's portfolio of loans, the strength of its management, and areas that may need corrective action to improve its safety, soundness, and compliance with law. While bank regulatory agencies encourage examiners to make their reports candid, careful, and complete, the reports often include preliminary analysis and commentary. The examination report (known in some agencies as the "open" portion) is made available to the bank, on the condition that it not be disclosed outside the bank. The agencies retain the supporting information for the report (which in some agencies is known as the "closed" portion). Most agencies also include in the examination report and disclose to the bank what is known as a CAMEL rating: a composite summary in numerical form of key components of the examination--Capital, Asset quality, Management, Earnings, and Liquidity. There are also ratings for each factor in the closed portion.

---

[1] The use of the term "bank" herein is intended to refer to all financial institutions whose information is subject to Exemption 8. Likewise, the term "bank regulatory agency" refers to any agency responsible for the regulation or supervision of financial institutions.

Justification for Scope of Exemption 8

The Administrative Conference has always endorsed the FOIA concept of disclosure of government records[2] while recognizing the need to balance competing concerns.[3] Thus, it concludes that, while the basic protection of confidential and sensitive data relating to *open* banks should continue, where documents or information in agencies' possession are already public or relate to an institution no longer operating, the public interest in disclosure outweighs the potential harm from such disclosure.

Exemption 8's protection of operating, condition and examination reports is generally seen as serving three primary purposes. First, it protects banks--including both the examined bank and those that have relationships with it--from substantial harm that might be caused by disclosure of information and opinion about their condition. Second, it facilitates the free exchange of information between bank personnel and examiners and encourages bank examiners to be candid, and as necessary, immediately responsive, in their assessments of a bank's financial position and operation. Lastly, it protects the privacy of bank customers (e.g., depositors and borrowers).

Bank regulators and the institutions they regulate and/or supervise have generally asserted the need to protect both the candor of examination reports and the nonadversarial nature of the relationship between examiners and financial institution officials. In particular, they have expressed concern that disclosure of sensitive adverse information--especially preliminary data, information, and conclusions--could reduce the candor of the examiners' comments and analysis, and inhibit bank officials from offering open access to their records and from being frank and open in their discussions with the examiners. Examination reports, they point out, are intended to draw the attention of bank management to actual and potential problems as quickly as possible.

---

[2] *See* ACUS Recommendation 71-2, *Principles and Guidelines for Implementation of the Freedom of Information Act.* See also Presidential Memorandum for Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993)(Policy statement on the use of the FOIA encouraging agencies to disclose agency records in the absence of any clear harm); Attorney General's Memorandum for Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993).

[3] *See* ACUS Recommendation 82-1, *Exemption (b)(4) of the Freedom of Information Act*; Recommendation 83-4, *The Use of the Freedom of Information Act for Discovery Purposes.*

The exemption is also aimed at protecting the stability of financial institutions by preventing the inappropriate disclosure of information relating to the soundness of the institution, as reflected in examination reports and in operating and condition reports. The expressed concern is to avoid "runs on the bank," as well as other adverse impacts--e.g., short-term liquidity problems, volatility in cost of funds, reduced access to credit or to depositors. Nondisclosure is further justified on grounds that harmful overreactions based on incomplete data are likely to outweigh any public benefits. Financial institutions are also by their nature interrelated, in the sense that an adverse impact on one may have broad and possibly severe adverse implications for others. Moreover, the need for disclosure is diminished insofar as the public already receives, as a result of various banking and securities law requirements, a substantial amount of detailed, comparable information about banks.

Finally, there is a critical interest in protecting the privacy of those doing business with a financial institution. Examiners evaluate samples of loans. Information that might permit identification of the borrowers and other customers, as well as information about their financial situation and soundness, may appear in examination reports. There seems little doubt that information that might identify customers generally should be exempt from disclosure.[4]

Proper Scope of Exemption 8

Because of these considerations, the Conference believes that Exemption 8's provisions should be retained for "matters that are contained in or related to examination...reports" pertaining to *open* banks. The continued protection of examination reports of open institutions seems appropriate under the current regulatory regime.

Congress should, however, limit the exemption's coverage with respect to information in operating and condition reports that is publicly available. Almost all of the information contained in operating and condition reports (i.e., quarterly statements of income and expenses, assets and liabilities) is currently in the public domain. As a result, bank regulatory agencies generally do release such information even though it may literally fit within Exemption 8. There is, therefore, no reason to retain this portion of the exemption insofar as it permits nondisclosure of publicly available data.

---

[4] Protection of a customer's privacy interest may require redaction of more than a customer's name; other characteristics of the loan might reveal customer identifications.

The more difficult question is whether the protection of other information covered by Exemption 8 continues to be warranted. Although the Conference concludes that examination reports with respect to *open* institutions should remain protected, it believes that examination reports (including all CAMEL ratings) of *closed* institutions that have failed should not be exempt from disclosure. (Closed institutions that did not fail would be treated like open institutions for this purpose.[5])

The deposit insurance program gives the public (and the taxpayers) a particular interest in knowing what caused a bank to fail and whether regulatory oversight was adequate or effective.[6] Release of examination report information is unlikely to cause any harm to the institution itself once it is closed; nor is there any ongoing relationship between the examiner and the bank officials that would be jeopardized by disclosure. The examiners' concern about protecting candor is sharply reduced for banks that are closed.[7] Further, the disclosure of such information pertaining to closed banks would, of course, continue to be subject to other FOIA exemptions.[8]

Nonetheless, to further ensure that disclosure will not cause undue harm, the Conference recommends that certain limitations be placed on disclosure of examination reports of closed banks that have failed. Disclosure concerning a failed bank that could reasonably be expected to impair the solvency of an open bank or efforts to sell the failed institution or its assets should be delayed. Similarly, disclosure should be delayed where it could reasonably be expected to interfere with an ongoing civil or criminal investigation. Information relating to specific loans or other information that would identify customers could be redacted. Moreover, in cases where either the Federal Deposit Insurance Corporation or the Resolution Trust Corporation is involved in responding to the bank's failure, other bank regulatory agencies should consult with them before releasing examination reports.

---

[5] The Conference does not seek to define when a closed bank would be deemed to have failed. As discussed below, among the bases for recommending that information about closed failed banks be available under FOIA are the role of government oversight and impact on taxpayers.

[6] While Congress has mandated reports by the agency's Inspector General for certain bank failures after July 1, 1993 (*see* Federal Deposit Insurance Corporation Improvement Act of 1991, 12 USC §1831o(k)), disclosure of the underlying data, if requested, may provide a useful validation or check on such reports.

[7] Despite recent history, the vast majority of all financial institutions do not fail. This recommendation, therefore, addresses only the disclosure on request of examination reports of a narrow group of banks where the justification for release of the data is especially compelling.

[8] Among the potentially relevant exemptions are Exemptions 4 (confidential commercial or financial information), 5 (agency predecisional documents), 6 (personal privacy), and 7 (investigative reports).

Separately, the Conference also proposes that Congress consider whether Exemption 8 should continue to apply to situations where examination or other reports of financial institutions are prepared by agencies having no authority to regulate or otherwise supervise those institutions.[9] Especially where the financial institutions do not accept deposits from the public and there is no applicable deposit insurance, Congress should review whether the policies underlying the Exemption apply.

If Congress believes that additional information relating to financial institutions would improve accountability and oversight or provide for a better-informed marketplace, the Conference recommends that Congress consider using the approach taken in the Community Reinvestment Act, where specific, focused, published reports have been required.[10]

Administration of Exemption 8

There are a number of actions bank regulatory agencies can take under their current authority to improve implementation of Exemption 8. Several bank regulatory agencies have already implemented many of them, and the Conference recommends their consideration by all. As a first step, agencies that regulate or supervise financial institutions should ensure that information that is otherwise publicly available is not treated as exempt under the FOIA. For example, as noted, operating and condition reports contain information that appears largely to be publicly available from other sources. To the extent that this and other information currently withheld under Exemption 8 is otherwise available and can be separated from sensitive data, agencies should release such information. Agencies should also continue to review their data collection forms and information-gathering documents and design them so that confidential information is collected separately and can be easily segregated from information that could be disclosed.

Several bank regulatory agencies now participate in an interagency FOIA group. The Conference lauds this effort, and encourages all bank regulatory agencies to coordinate their application of the exemption and its scope, in order to ensure that similar documents are treated similarly. In doing so, agencies should keep in mind the FOIA's intent to allow the public to know what agencies are doing to the greatest extent possible. Agencies generally should presume, for example, that if one agency releases a particular type of document, such documents should be released by all other agencies if requested. Agencies also should avoid routinely exempting documents that are "related to" examination reports without carefully evaluating whether the information could be disclosed. Even though an examination report itself may be nondisclosable, not all portions of all documents related to it are necessarily also nondisclosable.

---

[9] *See, e.g.,* Public Citizen v. Farm Credit Administration, 938 F.2d 290 (D.C. Cir. 1991) (Reports of FCA regarding the National Consumer Co-op Bank covered by Exemption 8).

[10] The Community Reinvestment Act, 12 USC §2906, requires reports concerning credit made available by banks in low and moderate income areas. See also the Federal Deposit Insurance Corporation Improvement Act of 1991, which requires reports by the agency's Inspector General for each bank failure after July 1, 1993.

Bank regulatory agencies should also consider using the ombudsmen recently mandated by statute[11] to inquire into citizen concerns about handling FOIA requests and to recommend solutions or possible systemic improvements. The Conference has previously stated that use of alternative means of dispute resolution should be explored in resolving FOIA disputes.[12]

Agencies generally have the discretion to release requested information even if it is otherwise exempt under the FOIA. Pending Congressional action on the recommendations to modify Exemption 8, the bank regulatory agencies should implement the recommendations independently and, in any case, they should experiment with the release of examination reports for large failed banks. This would provide information to the public about the banks for which the largest amounts of money (and potentially, public funds) are at stake, and would provide an opportunity for determining whether such release has any significant untoward effects.

RECOMMENDATIONS

I. As applied to open financial institutions and closed financial institutions that have not failed, the provisions of Exemption 8 of the Freedom of Information Act should be retained for "matters that are contained in or related to examination...reports." The Conference concludes that bank regulatory agencies should continue to have discretion to withhold such examination reports, because, among other reasons, (a) disclosure of material relating to supervision and regulation of open financial institutions might have an adverse impact on the supervisory and regulatory process and on the banks themselves,[13] (b) such disclosure also might have an adverse economic impact on other banks, due to the unique interrelationship of such institutions, and (c) a substantial amount of related information is already otherwise available.

---

[11] The Office of the Comptroller of the Currency has an ombudsman, whose current responsibilities include involvement in banks' challenges to their CAMEL ratings. Recently enacted Pub. L. No. 103-325 requires each federal banking agency to appoint an ombudsman to deal with complaints from the public about regulatory activities.

[12] Administrative Conference Statement 12, 1 CFR 310.12 (1993). It has also recommended the use of ombudsmen more generally in federal agencies. Administrative Conference Recommendation 90-2, *The Ombudsman in Federal Agencies*, 1 CFR 305.90-2 (1993).

[13] The use of the term "bank" herein is intended to refer to all financial institutions whose information is subject to Exemption 8. Likewise, the term "bank regulatory agency" refers to any agency responsible for the regulation or supervision of financial institutions.

II. A. In order to ensure that information about banks is not unreasonably withheld, Congress should limit the exception to disclosure in Exemption 8 as follows:

1. As applied to closed institutions that have failed, examination reports and CAMEL ratings should not be exempt from disclosure, except that disclosure should be delayed where it could reasonably be expected to (a) impair the solvency of an open bank or an agency's efforts to sell the closed bank or its assets, or (b) interfere with an ongoing civil or criminal investigation. Records identifying specific loans or customers could be redacted,[14] and prior consultation with other agencies with jurisdiction over such a closed bank should be required.

2. As applied to all financial institutions, operating and condition reports should not be exempt from disclosure insofar as they contain or are based on publicly-available information.

B. Congress should also consider whether Exemption 8 should continue to apply to examination or other reports of financial institutions prepared by agencies having no authority to regulate or otherwise supervise those institutions, especially where the financial institutions do not accept deposits from the public.

III. To the extent that Congress determines that additional information relating to the regulation or examination of financial institutions should be publicly available to enhance accountability and oversight, it should provide for preparation of special public reports and analyses, or for other mechanisms specifically designed to provide the necessary information to the public on a systematic basis.[15]

IV. Agencies with supervisory or regulatory responsibilities relating to financial institutions should continue to review ways to improve their administration of the Freedom of Information Act.

A. Bank regulatory agencies should implement the following practices:

1. Information subject to Exemption 8 should be withheld only insofar as necessary to protect the efficacy of the examination process and the

---

[14] This recommendation does not seek to alter the applicability of other FOIA exemptions or of notice requirements such as those set out in Executive Order 12600 (relating to predisclosure notification for confidential commercial information).

[15] For an illustration of such a report, see the Community Reinvestment Act, 12 USC §2906 (reporting on supply of credit by banks in low and moderate income areas).

privacy of sensitive data and to avoid adverse economic impacts on other banks. Agencies should not withhold information on the basis that it is "related to" operating, condition or examination reports unless they determine that nondisclosure is properly justified.

2. Information that is already publicly available should not be treated as exempt from disclosure. For example, agencies should continue, in response to FOIA requests, to release operating and condition information submitted by financial institutions that is publicly available.

3. To facilitate the disclosure of releasable information, agencies should, to the extent feasible, design data-collection forms or other information-gathering mechanisms in order to separate disclosable and nondisclosable information.

4. Agencies authorized to rely on Exemption 8 should continue to develop a coordinated approach for releasing information, so that the public receives uniform treatment for similar data or types of documents.

5. Agencies should consider using their ombudsmen to inquire into citizen concerns about handling of FOIA requests and to recommend solutions or possible systemic improvements.[16]

B. In light of their discretion to release even otherwise exempt information in response to requests under the FOIA, bank regulatory agencies should implement the recommendations set forth in Part II(A). In any case, agencies should, on an experimental basis, immediately make the disclosures recommended therein with respect to large failed financial institutions.

---

[16] See Pub. L. No. 103-325, which requires each federal banking agency to appoint an ombudsman. *See* Administrative Conference Recommendation 90-2, *The Ombudsman in Federal Agencies,* 1 CFR 305.90-2 (1993).

Recommendation 95-2

Debarment and Suspension from Federal Programs

I. Introduction

The federal government is very big business in its purchases of products and services and in its provision of grants, loans, subsidies, and other types of economic assistance. Many private companies—small, medium, and large—rely to a significant degree on their business with the government for economic survival. In this recommendation, the Administrative Conference of the United States addresses several significant issues that arise when federal agencies act to protect the public fisc by suspending or debarring individuals and companies who allegedly are not responsible enough to continue to do business with the government.

The Administrative Conference of the United States has considered the topic of debarment and suspension from federal programs several times in the last 35 years. The 1961-62 temporary Administrative Conference issued a series of influential recommendations on the procedural structure of debarment and suspension of federal contractors. A 1975 study done for the Conference found that those recommendations remained sound. Since then, there has been substantial activity in the debarment and suspension area, as the Federal Acquisition Regulation (FAR) and other regulatory programs have been promulgated to authorize such actions both in the procurement and nonprocurement arenas, and Congress has authorized debarment and suspensions in a variety of contexts.

The Conference's recent study focused on the regulatory programs involving procurement debarment coordinated by the Federal Acquisition Regulation Council (FAR Council)[1] and promulgated in the FAR,[2] and a comparable (but not identical) effort involving nonprocurement debarment coordinated separately by OMB (known as the "Common Rule").[3] The two debarment and suspension programs have similar structures, but they are not identical, and not completely complementary.

---

[1] The FAR Council includes representatives of the Office of Federal Procurement Policy in OMB, the General Services Administration, NASA, and the Department of Defense.

[2] 48 CFR §9.400 et seq.

[3] 53 Fed. Reg. 19,204 (1988).

Debarment refers to an action to preclude individuals and entities from receiving future contracts or other benefits such as loans or grants for a designated period of time. A suspension is a similar action on a temporary basis. They are intended to ensure that government "does business," in both its contracts and its nonprocurement assistance programs, only with individuals and entities that are "presently responsible."

The Department of Defense alone debarred or suspended 1,157 persons and businesses in 1994. Across the federal government, almost 6,000 entities were debarred or suspended the same year.

A. Procurement

The regulations set forth in the FAR provide that each agency should promulgate its own regulations consistent with the FAR provisions. The FAR provides that an agency may suspend a contractor on an immediate, temporary basis prior to a hearing, based on "adequate evidence" of a variety of actions relating to a lack of contractor integrity. A proposed debarment, for which there is no minimum evidentiary threshold set out in the FAR, also has the effect of immediately precluding the award of additional federal contracts. Contractors have the opportunity to present information and argument in opposition to a suspension or proposed debarment. In cases where there is a disputed issue of material fact, a contractor is entitled to an informal factfinding hearing where the contractor may appear with counsel, submit documentary evidence, and present and confront witnesses. The regulations do not specify the type of hearing officer. The regulations do contain a list of mitigating factors the debarring official (who is usually also the suspending official) should consider in deciding whether to debar or suspend. Most debarments involve contractors that have been indicted or convicted; relatively few involve disputed issues of material fact that would warrant a hearing.[4]

Contractor suspensions and debarments have government-wide effect; i.e., no executive branch agency may enter into a contract with a debarred or suspended contractor. The General Services Administration administers a list of debarred and suspended contractors.

---

[4] For example, 96 percent of the Air Force's debarments and suspensions are based on indictments and convictions. Neither the Army, Air Force, Defense Logistics Agency, nor the Navy has had fact-based hearings in any debarment or suspension cases in the last five years.

B. Nonprocurement

The nonprocurement debarment and suspension process is based on Executive Order 12549, issued in 1986. OMB led an effort for uniform regulations (the Common Rule), and at least 36 agencies have issued such a rule. The regulatory framework differs slightly from the procurement debarment system. The procedures are basically similar, with suspended persons entitled to appear in person or submit written argument and information after the suspension is effective, and a further informal hearing available in cases with disputed issues of material fact. Unlike in the procurement context, however, a proposed debarment does not have immediate effect. Nor do the nonprocurement regulations contain a list of factors the debarring official should consider in connection with the decision whether to debar or suspend.

As in the procurement context, nonprocurement debarments and suspensions have executive branch-wide effect and the GSA publishes a list of those debarred or suspended. However, those debarred or suspended under one (e.g., the nonprocurement) system are not now debarred from the other; i.e., there is no reciprocal effect.

Debarments and suspensions under both regulatory programs generally may not exceed three years. They may be terminated on a showing that, among other things, there has been a bona fide change in ownership or management, or that the causes on which the debarment was based have been eliminated.

II. Discussion

Although the nonprocurement and procurement debarment programs appear generally to be functioning fairly well, the Conference does recommend some changes to make the process more efficient and fairer.

A. Reciprocal Effect

As noted, the procurement and nonprocurement systems, while each having government-wide effect, do not have reciprocal effect. Legislation[5] and an executive order[6] have mandated that this problem be resolved, and the Conference underscores the importance of making the appropriate regulatory modifications promptly to ensure that debarment or suspension under one system leads to debarment or suspension under both. The Conference also believes that the existing provisions allowing agency heads to waive the applicability of a government-wide debarment or suspension for their agency should be retained.[7]

---

[5] The Federal Acquisition Streamlining Act, Pub. L. No. 103-355 (1994).

[6] Executive Order 12689, issued in 1989.

B. Debarring Officials and Hearing Officers

Neither regulatory framework specifies criteria for appointing the debarring official. Some agencies have written specifications identifying the type of official who is to perform this function, as well as the official who is to serve as a hearing officer in the relatively few cases where informal hearings on disputed issues of fact are held. However, there is no uniformity among the agencies that have established these criteria. For example, at the Department of Housing and Urban Development, where hearings are relatively frequent, administrative law judges (ALJs) or board of contract appeals (BCA) judges serve in effect as debarring officials, while also presiding over the hearings. At the Department of the Air Force, the debarring official is the Assistant General Counsel for Contractor Responsibility, and a military trial judge presides over any factfinding proceedings. The Environmental Protection Agency's debarring official is the director of its Office of Grants and Debarment, but the agency uses hearing officers who do not have the institutional independence of an ALJ, BCA judge, or military judge. Few agencies expressly require either the debarring official or the hearing officer to have any specific level of institutional independence.

The informal nature of the adjudication, as well as the process for a prehearing suspension, have been consistently upheld by the courts as providing due process.. Courts have occasionally discussed the need to ensure some measure of independence on the part of adjudicators.[8] Neither the FAR nor the Common Rule explicitly addresses the issue. Given the informal character of debarment and suspension determinations, as well as the "business" protection basis for such decisions, the strict separation of functions and total avoidance of ex parte contacts that would apply in more formal contexts may not be needed. However, it is important that the debarring official be sufficiently independent to protect due process. It is, for example, good practice that the debarring official not be supervised by nor directly supervise the investigators or advocates who are developing the cases. It is also good practice for debarring officials generally to ensure that all information that serves as the basis for decision appears in the administrative record, and that it is made available to the respondent in contested cases.

---

[7] Waiver and exception procedures are currently found in the FAR at 48 CFR 9.406-1(c), 9.407-1(d), and in the Common Rule at X.215.

[8] In *Girard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991), the court suggested the need for a separation of the prosecutorial and decisionmaking functions in a debarment case, but did not explicitly decide the issue.

When there is a hearing to resolve disputed issues of material fact in a suspension or debarment case, a greater degree of independence ought to be required on the part of the hearing officer. The Administrative Conference has recently taken the position that cases involving "imposition of sanctions with substantial economic effect" should be heard by administrative law judges.[9] Debarments and suspensions clearly can have substantial economic effect. Depending on the type of entity and the nature of its business, a debarment from federal contracts or other benefits may bankrupt a company. Therefore, while a full APA formal hearing is not constitutionally required in debarment and suspension cases, even where there are disputed issues of fact, use of a truly independent hearing officer is consistent with notions, and appearances, of fairness. In some statutory debarment programs, Congress has required that post-debarment hearings be presided over by ALJs.[10] ALJs clearly have the requisite independence. Administrative judges from boards of contract appeals and military judges have similar independence. They are experienced in providing hearings that ensure that the respondent has the proper opportunity to present a case. Using only such independent judges for factfinding hearings would also ensure uniformity among agencies; since a debarment has government-wide effect, the nature of a fact-finding hearing should not depend on the particular agency taking the action. The Conference therefore recommends that, where there are disputed issues of material fact in debarment or suspension cases, the agency assign an ALJ, BCA judge, or military judge to preside over the hearing. If an agency wishes to use some other hearing officer, it should ensure that such officer is guaranteed independence comparable to that of an ALJ.[11] Agencies should also provide in their rules whether the judge would issue (a) findings of fact that would be certified to the debarring official; (b) a recommended decision to the debarring official; or (c) an initial decision, subject to any appropriate further appeal within the agency.[12]

C. The FAR and Common Rule

As discussed above, the two sets of procedures, for procurement and for nonprocurement debarment and suspension, are not identical. Some of the variations relate to the differing natures of the programs they address. On other issues, uniformity might serve to eliminate confusion, especially in light of the government-wide effect and (hopefully soon-to-be) reciprocal impact. At a minimum, there are several issues that the Conference recommends be addressed in each set of rules.

---

[9] *See* Recommendation 92-7, *The Federal Administrative Judiciary*, at ¶A(1)(c).

[10] *See* 42 USC §1320a-7(exclusion of health care providers from Medicare program participation).

[11] *See* 5 USC §554(d)(2).

[12] Regarding the need to clearly set forth the appeals procedure, see Darby v. Cisneros, 113 S.Ct. 2539 (1993)(in absence of agency regulations governing agency appeal, respondents could proceed directly to court).

Both nonprocurement and procurement debarments and suspensions are discretionary. The procurement regulations include a list of mitigating factors the debarring official should consider in determining whether to debar or suspend.[13] No such list exists in the nonprocurement context, and neither program has a list of aggravating factors. The Conference recommends that a list of mitigating and aggravating factors be included in the regulations for both programs. These lists should be considered by debarring officials both in determining whether to impose a debarment or suspension, and in determining the period of debarment.[14] The Conference takes no position on whether any such list should represent an exclusive list of factors to be considered, but does recommend that each agency make clear its intention with respect to exclusivity. The Conference also notes that both aggravating and mitigating circumstances should focus on issues relating to the respondent's "present responsibility" to avoid any appearance that the debarment is intended as punishment.

As noted, each type of debarment is effective across the executive branch. There will thus be cases where a particular entity does business with multiple agencies. The Conference recommends that a procedure be developed by which agencies can efficiently and routinely coordinate with each other and determine which agency will serve as the lead agency on behalf of the government in taking debarment and/or suspension action. This would avoid multiple actions with inconsistent results. It may also ensure that the agency with the greatest interest will handle the case. The Conference is aware that agencies considering actions relating to the same respondent do confer informally in many cases, but believes that a more uniform, regularized process for agencies to determine a lead agency in particular cases would be preferable.

As also noted, suspensions become effective immediately. The suspended respondent may, after the fact, submit written comment and information to the debarring official opposing the continuation of the suspension. In some cases, the lack of advance notice is necessary to allow an agency to protect the integrity of its contracting or nonprocurement program. In other cases, however, it may be appropriate to provide advance notice to the potential respondent that a suspension or proposed debarment may be forthcoming. In fact, some agencies do send what are in essence "show cause" letters in certain situations. In cases where the interests of the government would not be substantially adversely affected by providing advance notice of a suspension of proposed debarment, the Conference encourages agencies to provide such notice.

---

[13] The procurement debarment rule indicates that the debarring official "should consider" the mitigating factors in determining whether to debar. The suspension rule provides that the suspending official "may, but is not required to consider" mitigating factors in determining whether to suspend. The Conference recommends that the "should consider" language be used in both debarment and suspension cases.

[14] The Administrative Conference has recommended standards for mitigating statutory money penalty amounts imposed administratively. *See* Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties.*

Given that debarments and suspensions have a government-wide effect and may soon also apply to both procurement and nonprocurement programs, it is especially important that respondents be given notice at the earliest opportunity of these potential impacts.

Suspensions require a finding of "adequate evidence" as a threshold for their issuance. Proposed debarments, which in the procurement context have a similar preclusive effect, have no such threshold. (An ultimate decision to debar must be based on the preponderance of evidence, however.) Given their immediate effect, a minimum evidentiary threshold for procurement proposals to debar would also be appropriate. The Conference recommends that proposals to debar in the procurement context require "adequate evidence of cause to debar."

The Administrative Conference also recommends that all agencies within the "executive branch" (broadly construed to include "independent" agencies) should implement the "Common Rule" and those portions of the FAR that address suspension and debarment.

D. Statutory Debarments

The procurement and nonprocurement debarment and suspension programs are based in regulation and/or executive order. There are also many statutorily-based debarment schemes, some of which also involve procurement and nonprocurement programs. In many of these statutory programs, Congress has restricted agencies' discretion whether to debar, or to determine the length of a debarment.[15] Congress has increasingly opted to require agencies to debar or suspend in particular situations. Debarment and suspension are not intended to be punitive remedies, but rather are premised on the need to protect the integrity of government programs. The Conference believes that Congress should ordinarily allow agencies to retain the discretion to determine (1) whether debarments or suspensions are appropriate in individual cases, and (2) the appropriate length of such debarments. Moreover, Congress should review existing statutory schemes that mandate debarment and/or particular terms of debarment, and determine whether they should be continued. The primary basis for recommending that agency discretion not be limited with respect to most debarment and suspension determinations is the need to retain flexibility to meet the needs of the government and the public. The Conference believes that agency officials generally would be in a better position than Congress to determine appropriate remedial sanctions in individual cases that serve both to protect the fisc and meet program needs.[16]

---

[15] For example, DHHS is required to "exclude" from participation in the Medicare and Medicaid programs for five years any health care provider who is convicted of a crime related to the provision of services under those programs, or of patient abuse. 42 USC §1320a-7(a).

The co-existence of the regulatory debarment programs that are the focus of this recommendation with a broad variety of statutory debarment programs creates a number of issues that relate to the interactions between them. The Conference may in the future study these issues, which include conflicts that arise from inconsistent procedural requirements and questions about whether all statutory programs are intended to have government-wide effect.

RECOMMENDATION

I. Entities coordinating the Federal Acquisition Regulation (FAR) and the Common Rule for nonprocurement debarment, and individual agencies in their procurement and nonprocurement debarment and suspension regulations, should promptly ensure that the applicable regulations provide that suspensions or debarments from either federal procurement activities or federal nonprocurement activities have the effect of suspension or debarment from both, subject to waiver and exception procedures.[17]

II. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should ensure that:

A. cases involving disputed issues of material fact are referred to administrative law judges, military judges, administrative judges of boards of contract appeals, or other hearing officers who are guaranteed similar levels of independence[18] for hearing and for preparation of (1) findings of fact certified to the debarring official; (2) a recommended decision to the debarring official; or (3) an initial decision, subject to any appropriate appeal within the agency.

B. debarring officials in each agency should:

1. be senior agency officials;
2. be guaranteed sufficient independence to provide due process; and

---

[16] This recommendation should not be read to discourage Congress from providing guidelines for agencies to consider in exercising their discretion.

[17] Waiver and exception procedures are currently found in the FAR at 48 CFR 9.406-1(c), 9.407-1(d), and in the Common Rule at X.215.

[18] See 5 USC §554(d)(2).

3. in cases where the agency action is disputed, ensure that any information on which a decision to debar or suspend is based appears in the record of the decision.

III. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should provide that each regulatory scheme for suspension and debarment includes:

A. a list of mitigating and aggravating factors that an agency should consider in determining (1) whether to debar or suspend and (2) the term for any debarment;

B. a process for determining a single agency to act as the lead agency on behalf of the government in pursuing and handling a case against a person or entity that has transactions with multiple agencies;

C. (with respect to procurement debarment only) a minimum evidentiary threshold of at least "adequate evidence of a cause to debar" to issue a notice of proposed debarment;

D. a requirement that all respondents be given notice of the potential government-wide impact of a suspension or debarment, as well as the applicability of any such action to both procurement and nonprocurement programs; and

E. encouragement for the use of "show cause" letters in appropriate cases.

IV. All federal agencies in the executive branch (broadly construed to include "independent" agencies) should implement the Common Rule and FAR rules on suspension and debarment.

V. Congress should ordinarily refrain from limiting agencies' discretion by mandating suspensions, debarments, or fixed periods of suspension or debarment. Congress should also review existing laws that mandate suspensions, debarments, and fixed periods, to determine whether to amend the provisions to permit agency discretion to make such determinations.

Recommendation 95-3

Review of Existing Agency Regulations

Federal agencies generally have systems in place to develop new regulations. Once those regulations have been promulgated, the agency's attention usually shifts to its next unaddressed issue. There is increasing recognition, however, of the need to review regulations already adopted to ensure that they remain current, effective and appropriate. Although there have been instances where agencies have been required to review their regulations to determine whether any should be modified or revoked, there is no general process for ensuring review of agency regulations.

The Administrative Conference believes that agencies have an obligation to develop systematic processes for reviewing existing rules, regulations and regulatory programs on an ongoing basis. If Congress determines that such a review program should be mandated, it should allow the President and agencies maximum flexibility to design processes that are sensitive to individual agency situations and types of regulations. Thus, such legislation should assign to the President the responsibility for overseeing agency compliance through general guidelines that take into account agency resources and other responsibilities. The obligation to review existing regulations should be made applicable to all agencies, whether independent or in the executive branch.

Given the difference among agencies, however, processes for review of existing regulations should not be "one-size-fits-all," but should be tailored to meet agencies' individual needs. Thus, the President, as well as Congress, should avoid mandating standardized or detailed requirements. Moreover, the review should focus on the most important regulations and offer sufficient time and resources to ensure meaningful analysis. Tight time frames or review requirements applicable to *all* regulations, regardless of their narrow or limited impact, may prevent agencies from being able to engage in a meaningful effort. It is important that priority-setting processes be developed that allow agencies, in consultation with the Office of Management and Budget and the public (including but not limited to the regulated communities), to determine where their efforts should be directed.

Public input into the review process is critical. The Administrative Procedure Act already provides in section 553(e) for petitions for rulemaking, which allow the public to seek modifications or revocation of existing regulations as well as ask for new rules. The Administrative Conference has in the past suggested some improvements in the ways agencies administer and respond to such petitions. See Recommendation 86-6, *Petitions for Rulemaking*. It suggests, among other things, that agencies establish deadlines for responding to petitions. The Conference reiterates that recommendation and proposes that, if necessary, the President by executive order or the Congress should mandate that petitions be acted upon within a specified time, for example 12-18 months.

Although petitions for rulemaking are a useful method for the public to recommend to agencies changes it believes are important, such petitions should not be allowed to dominate the agency's agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations. Agencies should also develop other mechanisms for public input on the priorities for review of regulations, as well as on the impact and effectiveness of those regulations.

Properly done, reviewing existing regulations is not a simple task. It may require resources and information that are not readily available. Each agency faces different circumstances, depending on the number of its regulations, their type and complexity, other responsibilities, and available resources. These processes must be designed so that they take into account the need for ongoing review, the agency's overall statutory responsibilities, including mandates to issue new regulations, and other demands on agency resources. Because there are relatively few successful well-developed models available and no widely accepted methodologies, the Conference recommends that agencies experiment with various methods. Such programs might explore different approaches with the aim of finding one (or several) that functions effectively for the particular agency. Agencies may want to look to activities at the state level, as well as the limited federal-level experience.

Review of existing regulations is primarily a management issue. As such, agency discretion must be recognized as important and judicial review should be limited. Agency denials of petitions for rulemaking under the APA are subject to judicial review, but courts have properly limited their scope of review in this context. There is no warrant for Congress to change current review standards, nor should any regularized or systematic program for review of existing regulations be subject to greater judicial scrutiny.

RECOMMENDATION

I. **Review Requirements**. All agencies (executive branch or "independent") should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or revoked. If Congress decides to mandate such programs, it should limit that requirement to a broad review, assign to the President the responsibility for overseeing the review process, and specify that each agency design its own program.

II. **Focus of Regulation Review**. Systematic review processes should be tailored to meet the needs of each agency, focus on the most important regulations, and provide for a periodic, ongoing review. The nature and scope of the review should be determined by, among other things, the agency's other responsibilities and demands on its resources. Sufficient time should be provided to allow meaningful information-gathering and analysis.

III. **Setting Priorities**. Agencies should establish priorities for which regulations are reviewed when developing their annual regulatory programs or plans,[1] and in consultation with OMB and the public. In setting such priorities, the following should be considered:

A. whether the purpose, impact and effectiveness of the regulations have been impaired by changes in conditions;[2]

B. whether the public or the regulated community views modification or revocation of the regulations as important;

C. whether the regulatory function could be accomplished by the private sector or another level of government more effectively and at a lower cost; and

D. whether the regulations overlap or are inconsistent with regulations of the same or another agency.

Agencies should not exclude from their review those regulations for which statutory amendment might be required to achieve desired change. Agencies should notify Congress of such regulations and the relevant statutory provisions.

IV. **Public Input**

A. Agencies should provide adequate opportunity for public involvement in both the priority-setting and review processes. In addition to reliance on requests for comment or other recognized means such as agency ombudsmen[3] and formally-established advisory committees, agencies should also consider other means of soliciting public input. These include issuing press releases and public notices, convening roundtable discussions with interested members of the public, and requesting comments through electronic bulletin boards or other means of electronic communication.

---

[1] *See* Executive Orders 12,498 ("Regulatory Program" required by President Reagan) and 12,866 ("Regulatory Plan" required by President Clinton).

[2] *See* (V)(B), *infra*.

B. The provisions of 5 USC section 553(e) authorizing petitions for rulemaking also provide a method for reviewing existing regulations. These provisions should be strengthened to ensure adequate and timely agency responses.[4] Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time. Congress should not modify the current limited judicial review standard applicable to petitions for rulemaking.

V. **Agency Implementation of Regulatory Review Processes**

A. Agencies should provide adequate resources to and ensure senior level management participation in the review of existing regulations.

B. As part of the review process, agencies should review information in their files as well as other available information on the impact and the effectiveness of regulations and, where appropriate, should engage in risk assessment and cost-benefit analysis of specific regulations.

C. In developing processes for reviewing existing regulations, agencies should consider:

1. *Frequency of review*: Regulations could be reviewed on a pre-set schedule (e.g., regulations reviewed every [x] years; a review date set at the time a new regulation is issued; regulations subject to "sunset" dates) or according to a flexible priority list.

2. *Categories of regulations to be reviewed*: Regulations could be reviewed by age, by subject, by affected group, by agencies individually or on a multi-agency basis.

D. Agencies should consider experimenting with partial programs and evaluate their effectiveness.

---

[3] *See* ACUS Recommendation 90-2, *The Ombudsman in Federal Agencies.*

[4] *See* Recommendation 86-6, *Petitions for Rulemaking.*

Recommendation 95-4

Procedures for Noncontroversial and Expedited Rulemaking

Rulemaking has been the subject of considerable debate and review in recent times. Concern has been expressed that rulemaking processes provide adequate opportunity for meaningful public input while allowing agencies, in appropriate circumstances, to expedite the implementation of rules when they either are needed immediately or are routine or noncontroversial. Agencies have experimented with procedures to achieve these objectives. Two of these procedures, "direct final rulemaking," and "post-promulgation comment" rules (also called "interim final rulemaking") are discussed here.

I. Direct Final Rulemaking

Direct final rulemaking is a technique for expediting the issuance of noncontroversial rules. It involves agency publication of a rule in the Federal Register with a statement that, unless an adverse comment is received on the rule within a specified time period, the rule will become effective as a final rule on a particular date (at least 30 days after the end of the comment period). However, if an adverse comment is filed, the rule is withdrawn, and the agency may publish the rule as a proposed rule under normal notice-and-comment procedures.[1]

The process generally has been used where an agency believes that the rule is noncontroversial and adverse comments will not be received. It allows the agency to issue the rule without having to go through the review process twice (i.e., at the proposed and final rule stages),[2] while at the same time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial.

Under current law, direct final rulemaking is supported by two rationales. First, it is justified by the Administrative Procedure Act's "good cause" exemption from notice-and-comment procedures where they are found to be "unnecessary." The agency's solicitation of public comment does not undercut this argument, but rather is used to validate the agency's initial determination. Alternatively, direct final rulemaking also complies with the basic notice-and-comment requirements in section 553 of the APA. The agency provides notice and opportunity to comment on the rule through its Federal Register notice; the publication requirements are met, although the information has been published earlier in the process than normal; and the requisite advance notice of the effective date required by the APA is provided.[3]

---

[1] When an agency believes that it can incorporate the adverse comment in a subsequent direct final rulemaking, it may use the direct final rulemaking process again.

[2] Rules are generally reviewed both by the agency and by the Office of Information and Regulatory Affairs. Internal agency review is often time-consuming. Under current practice, review of direct final rules by OIRA would be uncommon, because, under E.O. 12866, only rules deemed to be "significant" are subject to review. Should this policy be changed, the Conference urges that agency rules issued through the direct final rulemaking process be subject to no more than one OIRA review.

Because the process protects public comment and expedites routine rulemaking, the Administrative Conference recommends that agencies use direct final rulemaking in all cases where the "unnecessary" prong of the good cause exemption is available, unless the agency determines that the process would not expedite issuance of such rules. The Conference further recommends that agencies explain when and how they will employ direct final rulemaking. Such a policy should be issued as a procedural rule or a policy statement.[4]

The Conference recommends that agencies publish in the notice of the direct final rulemaking the full text of the rule and the statement of basis and purpose, including all the material that would be required in the preamble to a final rule. The Conference also recommends that the public be afforded adequate time for comment.[5]

The direct final rulemaking process is based upon the notion that receipt of "significant adverse" comment will prevent the rule from automatically becoming final. Agencies have taken different approaches in defining "adverse" comments for this purpose. Some have said that a mere notice of intent to file an adverse comment is sufficient. Others have required that the comment either state that the rule should not be adopted or suggest a change to the rule; proposals simply to expand the scope of the rule would not be considered adverse. Some have said that a recommended change in the rule would not in and of itself be treated as adverse unless the comment states that the rule would be inappropriate as published. The Conference recommends that a significant adverse comment be defined as one where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether a significant adverse comment is sufficient to terminate a direct final rulemaking, agencies should consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process.

---

[3] A separate Federal Register notice stating that no adverse comment has been received and that the rule will be effective on a date at least 30 days in the future can also be used to further alleviate any concern regarding proper advance notice to the public.

[4] The Conference has previously suggested that notice-and-comment procedures be used for procedural rules where feasible. *See* Recommendation 92-1, *The Procedural and Practice Rule Exemption From APA Notice-and Comment Rulemaking Requirements.*

[5] The Conference has previously recommended that the APA be amended to ensure that at least 30 days be allowed for public comment, while encouraging longer comment periods. Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, ¶IV and Preamble at p. 5.

To assure public notice of whether and when a direct final rule becomes effective, agencies should include in their initial Federal Register notices a statement that, unless the agency publishes a Federal Register notice withdrawing the rule by a specified date, it will become effective no less than 30 days after such specified date. Alternatively, an agency should publish a separate "confirmation notice" after the close of the comment period stating that no adverse comments were received and setting forth an effective date at least 30 days in the future. The effective date of the rule should be at least 30 days after the public has been given notice that the agency does not intend to withdraw the rule, unless the rule "grants or recognizes an exemption or relieves a restriction," 5 USC §553(d)(1), or is otherwise exempted from the delayed effective date of section 553(d) of the APA. The fact that a rule has proved noncontroversial is not itself an appropriate basis for dispensing with the delay in the effective date.

Agencies may also wish to consider using direct final rulemaking procedures in some cases where the text of the rule has been developed through the use of negotiated rulemaking. Where the course of the negotiations suggests that the result will be noncontroversial, the direct final rulemaking process offers the opportunity for expedited rulemaking while at the same time ensuring that the opportunity for comment is not foreclosed.

Although direct final rulemaking is viewed by the Conference as permissible under the APA as currently written, Congress may wish to expressly authorize the process. Authorization would alleviate any uncertainty and reduce the potential for litigation.

II. Post-promulgation Comment Procedures ("Interim Final Rulemaking")

Agencies have increasingly used a post-promulgation comment process commonly referred to as "interim final rulemaking" to describe the issuance of a *final* rule without prior notice and comment, but with a post-promulgation opportunity for comment. By inviting comment, the agency is indicating that it may revise the rule in the future based on the comments it receives—thus leading to the label of an "interim-final" rule.

Although the process has been used in a variety of contexts, it is used most frequently where an agency finds that the "good cause" exemption of the APA justifies dispensing with *prepromulgation* notice and comment. Recognizing the value of public comment, however, the agency offers an opportunity for comment after the final rule has been published.[6] This allows the agency both to issue the rule quickly where necessary and provide opportunity for some public comment. On the other hand, prepromulgation comment is generally considered preferable because agencies are perceived by commenters as more likely to accept changes in a rule that has not been promulgated as a final rule—and potential commenters are more likely to file comments in advance of the agency's "final" determination.

Under current law, agencies must be able to justify use of the good cause or other exemptions from notice-and-comment procedures under the APA if they are providing only post-promulgation comment opportunity. Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified. Where a rule is exempt from notice-and-comment requirements, however, it is still advantageous to provide such procedures, even if offered after the rule has been promulgated. Public comment can provide both useful information to the agency and enhanced public acceptance of the rule.[7]

The Conference therefore recommends that, where an agency invokes the good cause exemption because notice and comment are "impracticable" or "contrary to the public interest," it should provide an opportunity for post-promulgation comment.[8] This recommendation does not apply to temporary rules, i.e., those that address a temporary emergency or expire by their own terms within a relatively brief period, such as rules that close waterways for boat races or airspace for air shows.

When using post-promulgation comment procedures in this context, agencies should implement the following processes. The agency should include in the notice of the rule a request for public comment as well as a statement that it will publish in the Federal Register a response to significant adverse comments received along with modifications to the interim rule, if any. The Conference also suggests that an agency generally put a cross-reference notice in the "Proposed Rules" section of the Federal Register to ensure that the public is notified of the request for comment. The agency should then, and as expeditiously as possible, respond to any significant adverse comments and make any changes that it determines are appropriate. Agencies should consider including in the initial notice either a deadline by which they will respond to comments and make any appropriate changes or a "sunset" or termination date for the rule's effectiveness.

---

[6] The Administrative Conference has recommended such post-promulgation comment opportunity. *See* Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements.*

[7] *See also* Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-2 (to be codified at 2 USC 1532) (requirement for preparing analysis in connection with "general notice of proposed rulemaking" for rules resulting in non-federal expenditures of $100,000,000 or more).

[8] This is consistent with the Conference's long-standing position that such opportunity for comment should be offered. *See* n. 6, *supra*. *See also* Recommendation 90-8, *Rulemaking and Policymaking in the Medicaid Program*, ¶A(2).

The Conference addresses these recommendations in the first instance to the agencies. If they do not implement these proposals, the Conference recommends that the President issue an appropriate executive order mandating use of post-promulgation comment procedures for rules issued under the good cause exemption (except those invoking the "unnecessary" clause). If necessary, or when the APA is otherwise reviewed, Congress should amend the APA to include such a requirement.

The Conference also suggests that agencies consider using similar procedures for other rules issued initially without notice and comment, such as interpretive rules, procedural rules, or rules relating to grants, benefits, contracts, public property, or military or foreign affairs functions.[9] Only for those rules where notice and comment are considered unnecessary should such processes not be used; in such cases, agencies should consider direct final rulemaking.

Where an agency has used post-promulgation comment procedures, responded to significant adverse comments and ratified or modified the rule as appropriate, the Conference suggests that a reviewing court generally should not set aside that ratified or modified rule solely on the basis that adequate good cause did not exist to support invoking the exemption initially. At this stage, the agency's initial flawed finding of good cause should normally be treated as harmless error with respect to the validity of the ratified or modified rule.

RECOMMENDATION

I. Direct Final Rulemaking

A. In order to expedite the promulgation of noncontroversial rules, agencies should develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comment. Agencies should define "significant adverse comment" as a comment which explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. Procedures governing the direct final rulemaking process should be established and published by each agency.

---

[9] Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*. *Cf.* Recommendation 92-1, *The Procedural and Practice Rule Exemption From APA Notice-and-Comment Rulemaking Requirements*.

B. Direct final rulemaking should provide for the following minimum procedures:

1. The text of the rule and a notice of opportunity for public comment should be published in the final rule section of the Federal Register,[10] with a cross-reference in the proposed rule section that advises the public of the comment opportunity.

2. The notice should contain a statement of basis and purpose for the rule which discusses the issues the agency has considered and states that the agency believes that the rule is noncontroversial and will elicit no significant adverse comment.

3. The public should be afforded adequate time (at least 30 days) to comment on the rule.

4. The agency's initial Federal Register notice should state which of the following procedures will be used if no significant adverse comments are received: (a) the agency will issue a notice confirming that the rule will go into effect no less than 30 days after such notice; or (b) that unless the agency publishes a notice withdrawing the rule by a specified date, the rule will become effective no less than 30 days after the specified date.[11]

5. Where significant adverse comments are received or the rule is otherwise withdrawn, the agency should publish a notice in the Federal Register stating that the direct final rulemaking proceeding has been terminated.[12]

C. Agencies should also consider whether to use direct final rulemaking following development of a proposed rule through negotiated rulemaking.

D. If legislation proves necessary to remove any uncertainty that direct final rulemaking is permissible under the APA, Congress should amend the APA to confirm that direct final rulemaking is authorized.

---

[10] Agencies should also consider other mechanisms for providing public notice.

[11] 5 USC 553(d) provides for exemption from the 30-day advance notice where, for example, the rule "grants or recognizes an exemption or relieves a restriction."

[12] At that point, of course, the agency may proceed with usual notice-and-comment rulemaking, or if the agency believes that it can easily address the comment(s), it may proceed with another direct final rulemaking.

II. Post-promulgation Comment Procedures (Interim-Final Rulemaking)

A. Agencies should use post-promulgation comment procedures (so-called "interim final rulemaking") for all legislative rules that are issued without prepromulgation notice and comment because such procedures are either "impracticable" or "contrary to the public interest."[13] 5 USC §553(b)(3)(B) ("good cause exemption").[14] If necessary, the President should issue an appropriate executive order or Congress should amend the APA to include such a requirement.

B. When using post-promulgation comment procedures, agencies should:

1. publish the rule and a request for public comment in the final rules section of the Federal Register, and, in general, provide a cross-reference in the proposed rules section that advises the public that comments are being sought.

2. include a statement in the Federal Register notice that, although the rule is final, the agency will, if it receives significant adverse comments, consider those comments and publish a response along with necessary modifications to the rule, if any.

3. consider whether to include in the Federal Register notice a commitment to act on any significant adverse comments within a fixed period of time or to provide for a sunset date for the rule.

C. Where an agency has used post-promulgation comment procedures (i.e., appropriate agency ratification or modification of the rule following review of and response to post-promulgation comments), courts are encouraged not to set aside such ratified or modified rule solely on the basis that inadequate good cause existed originally to dispense with prepromulgation notice and comment procedures.

D. Agencies should consider using post-promulgation comment procedures for all rules that are issued without prepromulgation notice and comment, including interpretive rules, procedural rules, rules relating to contracts, grants etc., or military or foreign affairs functions.[15]

---

[13] This recommendation does not apply to temporary rules, meaning those that expire by their own terms within a relatively brief period.

[14] The Conference does not recommend a change in the coverage of the "good cause" exemption, but does not oppose a change if such a change is understood simply as a codification of existing practice.

[15] However, this recommendation does not apply to rules issued under the "unnecessary" clause of the good cause exemption; in such cases, agencies should consider using direct final rulemaking. *See* part I, above.

Recommendation 95-5

Government Contract Bid Protests

In contrast to the private contracting system, which relies mainly on profit maximization and reputation to constrain the discretion of private purchasers in dealing with potential sellers, United States law provides a variety of opportunities for disappointed seekers of government contracts to air their grievances against the contracting process and its results. In addition to pursuing redress within the purchasing agency, a disappointed offeror can challenge the government's conduct in one of four protest forums: the General Accounting Office (GAO), the General Services Board of Contract Appeals (GSBCA) (for contracts involving automated data processing and telecommunications equipment), the federal district courts, and the Court of Federal Claims. In no other area of public administration have Congress and the courts provided so large and diverse an array of avenues for challenging the decisions of government officials.

This complex system evolved in a number of steps over the last 75 years. Soon after its creation in 1921, GAO began accepting bid protests under its authority to settle and adjust claims involving the United States and to issue advisory decisions concerning questions of payment by the government. In a series of court opinions from the mid-1950's to 1970 [most notably the 1970 decision in *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C. Cir. 1970)], the federal district courts took on an expanded role in oversight of bid protests, and Congress extended authority to grant equitable relief in pre-award bid protest cases to the Claims Court (now the Court of Federal Claims) in the Federal Courts Improvement Act of 1982. The Competition in Contracting Act of 1984 (CICA) completed the foundation for the modern bid protest structure. CICA reflected a strong congressional presumption that government purchasing agencies should use competitive procurement techniques to increase opportunities for firms to compete for contract awards. It bolstered the bid protest mechanism and increased the ability of complaining offerors to gain access to information about the government's decisionmaking process.

The eleven years that have passed since enactment of that legislation provide a basis for reexamination of the Act's premises and its impact. In addition, the government procurement process has been the subject of much recent study by scholars, professional associations, and blue ribbon commissions including the Acquisition Law Advisory Panel and the National Performance Review. Congress has also given extensive recent consideration to procurement reform. Severe budget pressures have inspired several congressional committees to consider statutory changes that would reduce procurement transaction costs and induce a broader array of firms to compete for government contracts. The Federal Acquisition Streamlining Act of 1994, enacted last fall, changed many features of procurement regulation and signaled a new congressional receptivity to proposals for restructuring the procurement process, although it did not significantly change the structure of the bid protest process. Legislation introduced this spring and supported by the Clinton Administration would, among other things, establish a uniform arbitrary-and-capricious standard of review for all bid protests and eliminate the jurisdiction of the federal district courts. Other legislative initiatives are in development.

Proposals for reorganizing the bid protest process have been numerous and varied, including suggestions for a single administrative bid protest forum (one of the existing forums or a new entity), as well as for different combinations of existing or new forums. Issues such as the appropriate standard of review, available discovery, formality of procedure, and availability of a stay of the procurement pending the proceedings have also prompted widely varying suggested alternatives. Although much attention has been devoted to the bid protest process, however, it has been largely theoretical. Without additional, currently unavailable empirical information, the Administrative Conference does not believe it can recommend a specific design for an ideal forum or combination of forums to process bid protests.

Certain streamlining modifications to the existing system of alternatives, however, seem clearly appropriate without further study. In particular, the Conference sees no persuasive justification for preserving direct court jurisdiction over bid protests. The administrative options for hearing bid protests today are considerably more substantial than those that existed when *Scanwell* was decided or when Congress granted protest jurisdiction to the Court of Federal Claims. Moreover, the factual and legal issues involved in these cases are well within the competence of an administrative forum. Provision for direct judicial review of administrative protest decisions in the Court of Appeals for the Federal Circuit should adequately protect the rights of litigants (provided that the administrative decision includes clearly stated reasons, so that there will be a record adequate for judicial review) and promote the development of a consistent body of law related to protests.

Even if Congress decides to preserve direct recourse to the courts, there is no longer a need for initial district court jurisdiction. The Court of Federal Claims provides a satisfactory forum for court consideration of these cases. The caseload in question is not large enough to burden that court unduly, and through travel and, when appropriate, telecommunications, the Court of Federal Claims adequately meets the needs of litigants outside of Washington, DC.

To make wise decisions about the exact type of administrative forum (or forums) that should hear bid protests, however, requires empirical data on the impact of bid protests on government procurement that is not now available. Moreover, these issues raise questions about the basic premises underlying the bid protest system. Current law, and many of the debates about the number and nature of forums for review of bid protests, assume that a robust protest mechanism improves government procurement performance by spurring savings-generating competition for government contracts and by monitoring the performance of government officials who may not exercise discretion to the benefit of taxpayers. But there is scant empirical evidence for judging whether public purchasing officials are more prone to shirk their responsibility to maximize taxpayer interests than private purchasing officials are to shirk their responsibility to maximize shareholder interests, or what net effect the modern system of protest controls, including CICA and related protest reforms, has had on procurement outcomes.

Fundamental questions about the bid protest process—whether it is effective in increasing the efficiency and fairness of government procurement, what remedies it should provide to disappointed offerors, or what standard of review oversight tribunals (regardless of their number or location) should apply—are being debated in this empirical void. The Administrative Conference believes that informed decisions on these issues require a foundation of detailed empirical research that cannot adequately be conducted without Congressional authorization. In particular, Congress might pass legislation allowing selected government purchasing agencies to conduct business free from protest oversight for a period of time, with the results to be compared with those at agencies operating under traditional protest controls.[1] Additional avenues of research, including comparison of pre- and post-Competition in Contracting Act agency procurement, detailed study of the impact of GAO or GSBCA review on specific agency procurements, examination of state and local approaches to procurement and bid protests, or comparison of the procurement activity and results of a major government purchasing agency and a major private company purchasing department, would be aided significantly by legislative authorization to collect data and funding support. With the successful completion of such research, Congress and other policy makers would be able to make better informed judgments about the need for extensive protest oversight of government procurement activity and the proper forum and standard of review for any such protest oversight.

---

[1] The pending legislation would authorize the Administrator of the Office of Federal Procurement Policy to "waive any provision of law, rule or regulation necessary" to assist agencies in conducting test programs to evaluate specific changes in acquisition policies or procedures. S.669, Title V, Section 5001, amending section 15 of the Office of Federal Procurement Policy Act (41 USC §413). This broad provision might be read to include authority to waive laws requiring the availability of protest mechanisms.

RECOMMENDATION

I. **Initial Jurisdiction to Review Bid Protests**. Congress should streamline the system for handling bid protests by reducing the alternatives available for initial jurisdiction over bid protests.

A. All bid protests should be heard initially in some administrative forum independent of the agency office conducting the procurement.[2] To achieve this end, Congress should eliminate the direct jurisdiction of the Court of Federal Claims and of the federal district courts over bid protests. The United States Court of Appeals for the Federal Circuit should be given exclusive jurisdiction over all appeals from administrative bid protest decisions.

B. If Congress decides, notwithstanding Recommendation I(A), that the courts should retain direct jurisdiction over bid protests, then such initial court jurisdiction should be consolidated in the Court of Federal Claims for both pre-award and post-award protests.

II. **Testing Bid Protest Systems.** Congress should mandate empirical testing of the effect of the bid protest process to analyze the costs and benefits of that process and to determine whether it has improved the quality or reduced the cost of public procurement. This analysis should include evaluation of the impact of the bid protest process (and any alternatives under consideration) on existing and prospective bidders for government contracts as well as on the government. It should involve consideration of the potential impact of adjustments to the bid protest process (such as application of different standards of review of agency procurement decisions and imposition of sanctions for the filing of frivolous bid protests) as well as examination of the premises underlying the bid protest system as a whole. Specific approaches Congress should consider supporting include:

A. Cross-agency comparison--a pilot study in which one or more federal agencies that conduct a substantial amount of procurement activity would be permitted to conduct procurement with respect to some discrete type or types of contracts (e.g., computer or telephone equipment contracts) free of most or all bid protest controls for a specific period of years (e.g., five years), with the agencies' performance to be compared with their own performance before the beginning of the pilot and/or on bid protest-controlled contracts during the pilot period and with that of agencies continuing to operate under the existing bid protest system;

---

[2] The Administrative Conference takes no position in this recommendation on the preferred structure of, or standard of review to be applied by, such administrative forum(s). The Conference notes, however, that if GAO continues to be involved in handling bid protests and such cases are directly reviewable in the Court of Appeals for the Federal Circuit, the reviewing court would effectively review the contracting agency's decision on the procurement, as informed by the GAO opinion; to facilitate this process, agencies should conclude action on a procurement that has been reviewed by the GAO by issuing a clear statement of the agency's final determination and the reasons for it.

B. Competition in Contracting Act comparison--a comparison of the pre- and post-Competition in Contracting Act procurement experience of major government purchasing agencies to identify changes in agency behavior and procurement results;

C. GAO/GSBCA comparison--an examination of specific major procurements to determine whether GAO and GSBCA bid protest determinations (including the specific procedures available and standards of review applied in these forums) have produced desirable outcomes in particular procurements and to assess the impact of GAO and GSBCA rulings on purchasing agency conduct;

D. Government/private sector comparison--a comparison between the procurement experience of a major government purchasing organization and that of a major private company purchasing department to determine differences in the outcomes of efforts to purchase comparable goods or services over time;

E. Federal/state comparison--a comparison of federal government procurement experience with that of state and local governments that may employ procurement oversight mechanisms different in kind or degree from those at the federal level.

In pursuing any of these options or other studies of the procurement system, Congress should assign responsibility for research and evaluation to an independent body that is not directly involved in conducting major procurements or resolving bid protests. In the case of a pilot study, Congress should provide for regular collection of appropriate data during the pilot period to permit adequate evaluation.

Recommendation 95-6

ADR Confidentiality and the Freedom of Information Act

The Administrative Dispute Resolution Act (ADRA) accords a substantial measure of confidentiality to oral or written communications made in a covered dispute resolution proceeding. This protection was based upon Administrative Conference Recommendation 88-11, which recognized that in promoting the use of alternative dispute resolution (ADR) in federal agencies "a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements."

The confidentiality section of the ADRA, 5 USC 574, consists of a detailed set of standards reflecting generally the balance proposed in Recommendation 88-11. It is narrow in scope in that it is limited to communications prepared for the purposes of a dispute resolution proceeding. It does not protect an agreement to enter into a dispute resolution proceeding or the agreement or award reached in such a proceeding. It does not prevent the discovery or admissibility of otherwise discoverable evidence merely because the evidence was presented in a dispute resolution proceeding. It does not have any effect on the information and data necessary to document or justify an agreement reached in a dispute resolution proceeding. It also permits disclosure of a dispute resolution communication in special circumstances where all parties to the proceeding consent; where the communication has already been made public or is required by statute to be made public; or where a court determines disclosure is, on balance, necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health and safety sufficient to justify disclosure.

In the final stages of the legislative process leading to the passage of the ADRA, a question arose as to the relationship between the confidentiality section and the Freedom of Information Act (FOIA). With the understanding that the importance of passing the dispute resolution bill without delay justified an interim solution, a provision, subsection 574(j), was added on the Senate floor[1] providing

---

[1] During this colloquy, Senator Levin summarized as follows:

> I am pleased that we were able, for the purposes of passing this bill this year and getting the ADR process rolling, to temporarily resolve the confidentiality issue. As the

that the confidentiality section would not be considered an Exemption 3 statute under FOIA.[2]

This last minute addition has created a narrow, but significant, problem in accomplishing fully the purposes of the ADRA. In those circumstances in which dispute resolution communications become "agency records" within the meaning of FOIA, the confidentiality of the records is determined not by the provisions of section 574, but rather by the terms of the exemptions to FOIA. For users of ADR, the trumping effect of FOIA in this class of cases means that confidentiality is not governed by the careful balance struck in section 574 but rather by the complex body of FOIA law which accords no special protection for dispute resolution communications on the basis of the process needs of ADR. While some dispute resolution communications that become agency records—for example because they come under the control of a government-employee neutral—may be exempt from mandatory disclosure under FOIA, the scope of the exemptions and possible gaps in coverage create uncertainty as to the confidentiality of such records.

This uncertainty, in turn, has become a disincentive to the use of ADR.[3] Even though the ADRA has been in place for only four years, concern about the impact of FOIA on confidentiality has had a chilling effect on the use of ADR. This effect could become even more substantial if a case arose in which expected confidentiality was undermined by a FOIA claim. To accomplish the objectives of Recommendation 88-11, the confidentiality standards of section 574 should be given effect with respect to all covered dispute resolution communications, even where those communications become agency records under FOIA.[4]

> Administrative Conference of the United States wrote in its recommendation on this subject,***since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements.
>
> The provisions in this bill, as amended, do not as yet achieve that balance, and I am pleased that Senators Grassley and Leahy have agreed to address this issue more completely next year.

136 Cong. Rec. at S18088 (daily ed. Oct. 24,1990).

[2] Under Exemption 3, the FOIA disclosure requirements do not apply to matters that are "specifically exempted from disclosure by statute...provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

[3] Some added uncertainty has been raised by the ADRA's protection of "any information concerning" a dispute resolution communication. The recommendation calls for dropping this language.

[4] This recommendation pertains solely to the provisions of the ADRA. The Conference recognizes that agencies, in some circumstances, conduct similar processes under other authority.

RECOMMENDATION

I. The confidentiality section of the Administrative Dispute Resolution Act, 5 USC 574, should be amended to provide that records confidential under that section and generated by or initially submitted to the government in a dispute resolution proceeding are exempt from disclosure under the Freedom of Information Act, Exemption 3, 5 USC 552(b)(3).

II. Any alternative confidentiality procedures agreed to by the parties and neutral under subsection 574(d) should not, for purposes of Exemption 3, be construed to provide broader confidentiality than is otherwise available under section 574.

III. The words "any information concerning" should be deleted from section 574 (a) and (b).

Recommendation 95-7

Use of Mediation under the Americans with Disabilities Act

Despite the efforts of the agencies charged with enforcing the Americans with Disabilities Act (ADA), there are substantial backlogs of cases at the investigation stage at many agencies, creating unusually lengthy delays in enforcement. Because of enforcement delays, many individuals are not obtaining needed relief in a timely manner and respondents are not relieved of the burden of pending non-meritorious charges. In this era of shrinking government, an influx of significant additional public resources for investigation and litigation seems unlikely. The Equal Employment Opportunity Commission (EEOC) and the Department of Justice have each begun to experiment with alternative dispute resolution (ADR) as one approach to reducing backlogs and achieving compliance with the statute.[1] The Conference believes that mediation is the ADR technique that offers greatest immediate promise for resolving ADA cases more quickly and to the satisfaction of the parties involved, and that agencies with enforcement responsibilities under the ADA should offer the opportunity for mediation in appropriate cases. Mediation has the potential to preserve relationships between the parties and to empower them to take greater responsibility in resolving their disputes. In addition compliance with mediated settlements is generally high because of the parties' participation in developing the solution.

This recommendation is intended to encourage additional efforts to implement the use of mediation and to provide guidance on undertaking and evaluating a joint program.[2] The mediation program proposed in this recommendation expands on prior agency pilot mediation programs by including additional types of cases, and also provides a coordinated framework for mediation of ADA cases under all four titles of the statute.

---

[1] The ADA, 42 USC §12212, explicitly encourages the use of ADR, where appropriate and authorized by law, to resolve disputes arising under its provisions. General authority for use of ADR may also be found in the Administrative Dispute Resolution Act, 5 USC §572.

[2] Though mediation currently appears to be the most promising ADR technique for disputes arising under the ADA, the Conference encourages examination and experimentation with other ADR techniques. *See* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution.*

Because several agencies are charged with enforcement of the various titles of the ADA (EEOC, Department of Justice, Department of Transportation, and Federal Communications Commission), it is important that they jointly participate in designing the recommended mediation program. This collaborative effort will minimize costs and maximize benefits by using a common group of trained mediators to mediate a variety of ADA cases, selected for referral to mediation based on criteria established by the agencies. The joint effort should also develop sources of mediators who can serve at low cost or pro bono, at least at the inception of the program, and should consider ways to finance the costs of using mediators where such arrangements cannot be made.

Extensive evaluation of the program pursuant to criteria established as part of the program design will enable the agencies to gather the information necessary to refine the program so that it is used most effectively to resolve disputes at a low cost, in a manner that is fair to the parties and consistent with the statute. The evaluation should include analysis of the comparative costs of mediation, the effectiveness of mediation for different types of disputes, the satisfaction level of the participants, the impact on the case backlog, the effect on processing time of cases, the impact on systemic litigation, consistency of mediated results with the statute, and whether mediation disadvantages individuals with disabilities or other historically disadvantaged groups.

Analysis of the program results, along with the results of EEOC and Department of Justice pilot mediation programs, should provide the information necessary to ensure that mediation is furthering the goal of elimination of discrimination against the individuals with disabilities. The contemplated evaluation will permit the agencies to focus future mediation efforts on those cases where mediation is most effective. Additionally, successful experience with agency-sponsored mediation may encourage and empower actual or potential parties to use private mediation or even negotiation without neutral assistance to resolve future disputes, further conserving government and private resources.

RECOMMENDATION

I. Coordinated Mediation Program

A. The Americans with Disabilities Act (ADA) enforcement agencies[3] should establish a joint committee composed of representatives of each of the agencies to develop a program for voluntary mediation of ADA cases under all titles, in order to achieve the rapid, mutually agreeable resolution of disputes over compliance with the requirements of the ADA.[4] This committee also could serve the purpose of improving consistency in enforcement of the statute among the agencies. In order to assist the joint committee in creating a mediation program that will attract participants and meet their needs, the agencies should appoint an advisory committee pursuant to the Federal Advisory Committee Act, composed of representatives of potential participants, such as businesses, state and local government entities, representatives of organizations whose purpose is to represent persons with disabilities, and civil rights and labor organizations, to provide advice in program design.

B. The mediation program should follow the broad outlines set forth herein, as refined by the agencies' joint committee after consultation with the advisory committee. The program should utilize a common group of trained mediators to mediate a variety of disputes arising under the ADA. The joint committee should determine the criteria for mediator participation in the program, considering the pilot projects already established, which include mediator training, and the training previously conducted by the EEOC and the Department of Justice. If the number of trained mediators is insufficient, the agencies should jointly conduct or sponsor any necessary training. Mediators must also have sufficient knowledge of the various titles of the ADA, familiarity with resources for ADA compliance, and knowledge of the impact of various disabilities. The joint committee should identify potential sources of mediators who are willing to serve pro bono or at low cost, at least at the inception of the program, as well as sources of technical expertise[5] to assist in mediation.

---

[3] The primary enforcement agencies should be involved in establishing the program. These include the Department of Justice, Equal Employment Opportunity Commission, Department of Transportation, and Federal Communications Commission. Other agencies that could provide input into the process, refer cases to the program, and participate in the educational effort are the Federal Mediation and Conciliation Service and the Title II investigative agencies designated in 28 CFR §35.190: the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, the Interior, and Labor.

[4] Since there have been few cases under Title IV, which amends the Communications Act to ensure the availability of communication by wire or radio for individuals with speech or hearing disabilities, there may also be less opportunity to use mediation. Also, the FCC's enforcement process differs from those of the other ADA enforcement agencies. Nevertheless, efforts should be made to include appropriate Title IV cases in the mediation program to enable the best possible assessment of mediation's effectiveness.

C. The agencies should engage in extensive educational efforts to encourage use of the mediation process in a variety of cases and to enable unrepresented parties to participate effectively. The educational efforts should focus on informing parties and potential parties about the process to increase both participation rates and the effectiveness of participation.

D. The agencies should determine the selection criteria for referral of cases to mediation, refining and modifying the criteria based on evaluation of effectiveness. The agencies should consider combining mediation with an early assessment program which will assist in determining allocation of resources for investigative processes.

II. Review and Evaluation

A The mediation program should incorporate an after-the-fact agency review of settlements reached in mediation to examine their enforceability, consistency with the ADA, and whether the process reduces the time needed to resolve individual cases (both elapsed time and person-hours). This review should not result in overturning individual mediated settlements, nor should it impair the confidentiality of the mediation process or otherwise discourage participation in it.

B. In designing the program, the joint committee should establish program objectives, evaluation criteria, and a system for collecting the data necessary for evaluation. The evaluation process should be designed to provide data and analysis that will enable (i) a determination of the circumstances under which mediation is appropriate and effective for resolving ADA cases and (ii) the identification of any systemic problems that are not addressed by mediated settlements. The following issues should be included in the evaluation:

(a) in what types of cases is mediation most effective?

(b) at what point in the investigative process is mediation most effective, taking into account the costs of any investigation that precedes mediation?

(c) does mediation reduce the cost of processing cases for the parties and/or the government?

(d) what is the effect of mediation on processing time of cases, including whether mediation adds to processing time where it is unsuccessful?

(e) what is the impact of mediation on the investigation and case backlog?

---

[5] For example, architects, engineers, or vocational rehabilitation experts may be able to serve as mediators, or to act as advisers to inform parties of available technical options to help resolve disputes.

(f) what is the satisfaction level of the participants in mediation, including separate measures of satisfaction for complainants (charging parties) and respondents?

(g) what are the best sources of qualified mediators?

(h) is the use of a common group of mediators for various types of cases effective, taking into account costs, settlement rates, settlement results, and mediator performance?

(i) how are the costs of using mediators to be financed?

(j) are the results of mediated settlements, settlements reached through other processes, and litigation in similar cases comparable?

(k) does the mediation program impact systemic litigation?

(l) is agency review of mediated settlements effective and necessary?

(m) is the process equally fair and effective for represented and unrepresented parties?

(n) are individuals with disabilities disadvantaged in mediation?

(o) does availability of technical expertise affect settlement rates?

(p) what is the rate of compliance with mediated settlements?

Additional criteria deemed necessary and appropriate should be added by the joint committee designing the program.

C. The joint committee should review the mediation program regularly pursuant to the evaluation criteria and in consultation with the advisory committee, modifying the program as suggested by the results of the evaluation to ensure its continued effectiveness and consistency with statutory goals.

III. Consideration of Other ADR Techniques

The ADA enforcement agencies should jointly continue to study and evaluate other alternative dispute resolution techniques for disputes arising under the ADA.[6]

---

[6] *See* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, and the ADA, 42 USC §12212.

Statement No. 17

Comments on the Social Security Administration's Proposal on Reingineering the SSA Disability Process

In April 1994, the Disability Process Reengineering Team of the U.S. Social Security Administration issued a proposal on Disability Process Redesign (Redesign Proposal or Proposal). The SSA has asked for comments on this Proposal. This Statement constitutes the official comments of the Administrative Conference.

In general, the Conference supports most of the procedural changes that the Reengineering Team has proposed. Many of these changes have been recommended by the Conference as part of its past recommendations. In this Statement, the Conference presents its views concerning the Disability Process Redesign Proposal in light of these recommendations. This Statement does not address those aspects of the Proposal that relate to disability decision methodology.[1]

I. BACKGROUND

A. The Redesign Proposal

The Reengineering Team has made a series of significant proposals to change the way that disability claims are decided. The Proposal eliminates two of the current four administrative stages of the process, and assigns responsibility for developing the record to a claim manager at the initial stage and to an "adjudication officer" at the appeal stage. It retains the use of an administrative law judge for the appeal stage.

B. Past Administrative Conference Recommendations

The Administrative Conference has undertaken a series of studies over the last 15 years that address aspects of the procedures relating to the processing of claims for disability benefits under the Social Security Act. This series of recommendations has centered at least once on each of the many steps in the process as it currently exists. The focus of many of these recommendations has been to improve the quality of decisionmaking by making sure that as much of the necessary information is in the record as early in the process as possible.

---

[1] The sections of the proposal that address disability decision methodology relate to the structure for making the substantive decision whether a particular claimant meets the criteria for disability benefits. See Disability Process Redesign, "The Proposal from the SSA Disability Process Reengineering Team (April 1994) at 15-18.

In 1978, the Conference issued Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*,[2] which primarily addressed the administrative appeal stage of Social Security disability benefit adjudications. It recommended the continued use of ALJs, and made suggestions concerning the development of the evidentiary hearing record, including recommendations that ALJs take more care in questioning claimants, seek to collect as much evidence prior to the hearing as possible, make greater use of prehearing interviews, and make better use of treating physicians as sources of information.

In 1986, the Conference issued a recommendation on the use of nonattorney representatives in agency proceedings. Recommendation 86-1, *Nonlawyer Assistance and Representation*,[3] urged all agencies with "mass justice" programs, like the Social Security disability program, to encourage the use of nonlawyer representatives.

In 1987, the Conference issued two recommendations relating to the disability program. Recommendation 87-6, *State-Level Determinations in Social Security Disability Cases*,[4] addressed the first level of disability benefit determination and review. Recommendation 87-7, *A New Role for the Social Security Appeals Council*,[5] addressed the organization and function of the Appeals Council. Recommendation 87-6 was based on early results from demonstration projects involving the state-level disability determination process. It recommended additional experimentation with face-to-face procedures. Recommendation 87-7 suggested wide-ranging and substantial changes in the working of the Appeals Council, including that it move away from its historical function as a case review panel. The recommendation suggested that the caseload be significantly limited, and that the Appeals Council focus on important issues on which it could issue precedential opinions.

In 1989, the Conference issued two further recommendations affecting the disability program. Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability Determinations*,[6] addressed a variety of issues involving medical decisionmaking in disability claim determinations. It proposed enhancement of the role of medical decisionmakers, increased effort to develop medical evidence in the record, and improved training of the medical staff on legal and program issues. It recommended use of optional face-to-face interviews and elimination of the reconsideration step. It also recommended that claimants be informed of deficiencies in the medical evidence prior to the issuance of an initial determination, and that the opinion of a claimant's treating physician be given the weight required by court decisions and SSA rules. Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*,[7] recommended that agencies index and make publicly available adjudicatory decisions of their highest level tribunals, and further urged agencies that do not treat decisions as precedential to reexamine that policy. This general recommendation would apply to the SSA.

---

[2] 1 CFR 305.78-2 (1993).
[3] 1 CFR 305.86-1 (1993).
[4] 1 CFR 305.87-6 (1993).
[5] 1 CFR 305.87-7 (1993).
[6] 1 CFR 305.89-10 (1993).

Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendations*,[8] issued in 1990, made suggestions about several different aspects of the appeals process, aimed at improving the record for decision. It recommended enhancement of information provided in decision documents, increased use of prehearing conferences in cases where claimants are represented, greater use of subpoenas by ALJs, and a closing of the record after the ALJ hearing, subject to limited opportunity to reopen based on new information.

In 1991, the Conference addressed the representative payee program for disability benefits. Recommendation 91-3, *The Social Security Representative Payee Program*,[9] addressed a number of procedural issues raised by that program. Among the recommendations was that the opportunity for face-to-face meetings be provided.

II. DISCUSSION

As discussed more fully below, the Conference supports most of the Redesign Proposal's changes in the process for adjudicating disability claims. This Statement will address issues categorized by the step in the process to which they apply.

A. Initial Decision

1. Role of Disability Claim Manager

The proposal would assign full responsibility for claim development and initial decisionmaking to a disability claim manager. It also stresses the need to develop the record for decision as completely as possible at this stage. The Conference has consistently encouraged the development of as complete a record as possible, as early in the process as possible. Assigning that responsibility to a single well-trained person is consistent with the Conference's recommendations.

---

[7] 1 CFR 305.89-8 (1993).

[8] 1 CFR 305.90-4 (1993).

[9] 1 CFR 305.93-1 (1993).

The Conference suggests that claim development practices be undertaken consistent with Conference Recommendation 89-10, which emphasizes the importance of full and complete factual development of disability claims, in particular the medical aspects of such claims. Recommendation 89-10 also supports the current team approach to disability decisionmaking, and suggests an enhanced role for medical personnel in both claim development and disability determination. As discussed in more detail below, the Redesign Proposal retains a role for medical personnel as consultants to claim managers. The Conference recommends that claim managers be directed to consult with medical sources regularly on medical matters.

The Proposal would allow third parties to help develop the information necessary to decide a claim. This concept is a reasonable one, so long as the claim manager retains ultimate responsibility for developing an adequate record and for making the decision on benefits based on the record.

2. Role of Medical Personnel as Consultants

The Redesign Proposal suggests that claim managers may use medical consultants for advice on medical issues. The Conference, in Recommendation 89-10, suggested that the evaluation of medical evidence and decisions on medical issues should be made by a medical professional (physician or psychologist), who should also have responsibility for developing such evidence in the record. This recommendation was based on the two-member team approach currently in use at the state Disability Determination Service level. The Conference continues to believe that medically-trained personnel should have an important role in the decisionmaking process on medical evidence. Although the Proposal does state that disability claim managers will call on the services of medical consultants, it contemplates that the final decision on all matters, including the resolution of disputed medical issues, would rest with the claim manager. The Conference continues to stress the need to ensure that adequate consultation with medical experts takes place. Appropriate guidelines for such consultation should be developed.[10] The Conference also recommends the establishment of guidelines that set priorities for the use by claim managers of treating physicians, examining physicians, and nonexamining physicians, including specialists.

---

[10] *See* Recommendation 89-10(A)(2).

The Conference supports the aspects of the Proposal designed to improve the quality of evidence provided by medical sources for disability adjudications. Many of these improvements and proposals track suggestions included in Recommendation 89-10. For example, the Conference has recommended that physicians be adequately compensated for their work, and that all contacts be documented routinely in writing and included in the record.

3. Pre-denial Notice with Opportunity for Face-to-Face Interview

The Conference supports instituting the opportunity for a face-to-face interview between the claim manager and the claimant at the initial stage.[11] Such an opportunity will not only provide the claim manager with relevant information and the chance to ask for and get information efficiently, but it should also give claimants more confidence in the fairness of the process, by giving them an opportunity to be heard. This may have the effect of reducing appeals, even when benefits are denied, because the process will be seen to have increased legitimacy.

The Conference also supports the Redesign Proposal's concept of a predenial notice. The Conference has long supported the idea that claimants should be made aware of the deficiencies in their applications, and provided the opportunity to correct them.[12] Such steps are likely to lead to more accurate early decisionmaking.

4. Issuance of Full "Statement of the Claim" Decisions

The Conference supports the issuance of full decisions on disability benefit claims. The proposed contents for "Statement of the Claim" decisions are consistent with those the Conference recommended in Recommendation 90-4. Providing sufficient information to claimants helps them make informed decisions about future action.

B. Elimination of the Reconsideration Step

The Conference has also previously recommended that the reconsideration stage be eliminated if the claimant has an opportunity for face-to-face contact with the decisionmaker at the initial stage.[13] The Reengineering Team's proposal to provide such opportunity and to eliminate the redundancy of reconsideration is an important and positive step.

---

[11] *See* Recommendation 89-10(4)(b); *see also* Recommendation 91-3(2), and preamble at B(2).

[12] Recommendations 78-2(B)(4) ,89-10(b)(4), 90-4(1), 91-3.

[13] Recommendation 89-10(A)(4)(b), (B).

C. The Administrative Appeals Process

1. Use of Prehearing[14] Officer to Prepare Claim for Appeals

The Conference has long supported the concept of developing the record for an appeal as early in the process as possible.[15] Thus, the approach of designating someone to prepare the claim for appeal is one the Conference supports. The Conference also supports the idea that claims be granted based on evidence in the record without a hearing.[16]

The Conference also recommends that prehearing officers not be required to be attorneys, although knowledge of the legal system and of applicable law would appear to be relevant qualifications.

2. Use of Prehearing Conferences and Stipulations

The Conference supports the use of prehearing conferences and stipulations, which could streamline the hearing process by narrowing issues and ensuring that the necessary evidence will be available at the hearing. In some cases, a prehearing conference may obviate the need for a hearing. It is our understanding, based on discussions with the Redesign Team, that the Proposal would limit prehearing conferences to cases where claimants are represented. This is consistent with Conference recommendations.[17]

3. Consultation with Medical Sources in Appeals

The Conference believes that improved case development will result from the special responsibilities given to disability claim managers at the initial decisionmaking level and to prehearing officers at the administrative hearing level. At the same time, the Conference supports retaining authority for administrative law judges to consult with medical sources, as needed. The Conference believes that, in doing so, ALJs should follow practices similar to those set out in Recommendation 89-10.[18]

4. Retention of De Novo Hearing with an Administrative Law Judge

The Conference supports the proposed role for prehearing officers in developing the record as a way to improve the effectiveness of ALJ decisionmaking. The Conference's recommendations, however, have been predicated on the presumption that an ALJ would have the ultimate decisionmaking responsibility. Although others may be available to assist, the ALJ must retain the responsibility for the content and quality of his or her decisions.

---

[14] The Conference recommends using the term "prehearing officer" rather than "adjudication officer." The term "adjudication officer" suggests another level of decisionmaking, which, even under the Redesign Proposal, is not a completely accurate description.

[15] Recommendations 78-2(B)(1), (2).

[16] Recommendation 90-4(2).

[17] Recommendation 90-4, preamble and (2).

[18] Recommendation 89-10(C).

5. Role of the Appeals Council

The Conference has previously recommended that the Appeals Council role in the disability process be limited.[19] The Conference believes that, in reviewing cases, the Council should focus on cases raising precedential questions. The Conference supports the Proposal's idea of having the Appeals Council also review cases on a random basis, looking at both grants and denials. The Conference also believes that the Appeals Council should have a role in providing guidance to decisionmakers at all stages in the claims process, through the use of precedent and interpretive guidelines concerning adjudicatory principles and decisional standards.

D. Other Issues

1. Training

The Conference supports proposals to enhance training of all staff involved in processing and adjudicating disability benefit claims.[20]

2. Representatives

The Conference has recommended that claimants be provided information about sources of representation, both attorneys and nonattorneys.[21] It also has suggested that appropriate standards be adopted concerning proper practice, and that nonattorney representatives be encouraged.[22] The Redesign Proposal contains similar types of suggestions.

3. Precedent

The Proposal calls for a single presentation of all substantive policies used for determination of eligibility for benefits. This is consistent with a number of Conference recommendations that SSA make more use of agency guidance in disability benefits cases.[23] The Conference also recommends use of precedent and clear agency statements of policy to encourage uniform outcomes among similar cases. The Appeals Council could undertake, as one of its functions, the review of ALJ determinations for use as precedent.

---

[19] Recommendation 87-7.

[20] Recommendations 89-10(A)(6), 78-2(C).

[21] Recommendation 78-2(E).

[22] Recommendation 86-1.

[23] Recommendations 87-7(1)(a)(2); 78-2(c)(2); 89-8 n.2.

4. Reopening the Record

The Proposal implies that the record will be closed at the ALJ level. We support the idea that the record should close following the ALJ hearing, at a time set by the ALJ, and suggest that this be made explicit.

The Proposal is silent on the availability of any opportunity to reopen the record following the ALJ hearing. While the Conference does not generally encourage such reopenings, SSA should consider offering a limited opportunity to reopen the record in appropriate cases, consistent with Recommendation 90-4(4), (5).

REPORTS

Report for Recommendation 94-1

Federal Agency Use of Audited Self-Regulation as a Regulatory Technique

Douglas C. Michael
Associate Professor
University of Kentucky College of Law

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

EXECUTIVE SUMMARY 69
INTRODUCTION 71
I. Definition of "Audited Self-Regulation" 73
  A. Types of Regulation Included 73
  B. Other Types of Regulatory Reform Distinguished 75
II. THE COMPARATIVE ADVANTAGE OF AUDITED SELF-REGULATION 80
  A. Advantages of Audited Self-Regulation 80
    1. Technical Expertise 80
    2. Flexibility 81
    3. Incentives for Compliance 82
    4. Cost Savings to the Federal Government 83
    5. A Cornerstone of Regulatory Reform 84
  B. Disadvantages of Audited Self-Regulation 88
    1. Inadequate Enforcement 89
    2. Exercise of Unreviewable Discretion 90
    3. Political Restrictions on Delegation 91
III. ELEMENTS OF EFFECTIVE AUDITED SELF-REGULATION 92
  A. Characteristics of the Industry, Regulation, and Agency 92
    1. The Industry 92
    2. The Regulation 94
    3. The Agency 95
  B. Procedural Requirements 96
    1. The Nondelegation Doctrine 96
    2. Due Process Requirements 98
  C. Liability of Self-Regulatory Organizations 99
    1. Antitrust Liability 100
    2. Tort Liability 103
IV. SURVEY OF CURRENT USES OF AUDITED SELF-REGULATION 105
  A. Financial Institutions, Services and Products 105
    1. Securities Exchanges and Market Participants 105
    2. Commodity Exchanges and Market Participants 110
    3. Investment Advisers 115
    4. Accountants 117
  B. Accreditation for Government Benefit Programs 121
    1. Health Care Financing 121
      a. Hospitals and Other Providers and Suppliers 121
      b. Clinical Laboratories 126

            c. Peer Review of Medicare Services 128
        2. Higher Education Financing 131
    C. Nuclear Power Production 138
    D. Agricultural Marketing 140
        1. Marketing Agreements and Orders 140
        2. Research and Promotion Boards 144
V. A MODEL FOR THE SUCCESSFUL USE OF AUDITED SELF-REGULATION 146
    A. Advantages of Self-Regulation Demonstrated in the Survey 147
    B. Elements for Effective Self-Regulation Demonstrated in the Survey .. 147
    C. Necessary Conditions for Successful Audited Self-Regulation 149
        1. Effectiveness 149
        2. Fairness 151
VI. APPROACHES TO ENCOURAGING AUDITED SELF-REGULATION 152
    A. The Futility of Mandatory Regulatory Analysis 153
    B. Encouraging Self-Interested Regulation 155
BIBLIOGRAPHY 158

Executive Summary

Many federal government programs make use of a regulatory technique known as "audited self-regulation." This is defined as congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of review and independent action retained by the agency. Each agency's use of audited self-regulation has evolved independently, and together they are varied as the federal government itself. The purpose of this study is a comprehensive review of the major programs of audited self-regulation in selected executive departments and independent agencies, to determine if audited self-regulation as currently practiced is a beneficial regulatory technique and, if so, how it can be expanded or encouraged.

The literature of regulatory reform suggests several advantages of self-regulation. It should yield better rules because the rules are written by those directly involved in the regulated activity and thus have a better knowledge of the activity. The rules should be less rigid because they can be tailored to the industry or group, as opposed to federal rules of general application. And because the rules would be perceived by the regulated entities as more sensible and flexible, there would be a greater incentive to comply. There are some suggestions that costs of regulation to the government would be lower, and that even the overall combined costs would be lower because self-interested groups can regulate more efficiently. Finally, this type of regulation is more suited to modern laws and recent developments in regulatory theory which advocate replacement in many instances of old "command-and-control" regulation with new standards based on performance or outputs.

On the other hand, the literature also recognizes the potential disadvantages. Self-regulation clearly raises the possibility that the rules will be tailored more to the regulated entities' self-interest than the public interest. The enforcement may be varied and unpredictable, because a self-regulatory system has a greater opportunity for the regulators to exercise unreviewable discretion. And in certain subject areas, the concept of self-regulation is simply politically unacceptable.

Applying this literature, this study distills the elements of a successful self-regulatory program. The industry should be one which has members organized, expert, and motivated to comply. The regulation should be one which requires individualized application of general rules. The agency should be one with expertise in its regulatory subject and the skills to effectively audit the self-regulatory activity. In addition, the Constitution and the antitrust laws require a well-developed system of prior notice and opportunity for hearing in rulemaking and adjudication, and plenary control by the agency over all participants in the regulatory process. Although liability for tort damages on the part of the self-regulatory organization is a concern, the potential for liability is likely limited, and does not have a great impact on the design of a regulatory program.

With these theoretical elements of a successful program in hand, this study next surveys fourteen executive departments and independent agencies. This yields, from seven of those regulators, twelve examples of audited self-regulation. The programs regulate such diverse activities and subjects as student loans, health care quality, stock exchanges, agricultural marketing, nuclear power, and medical testing laboratories.

The findings from these surveys confirm most of the advantages and elements of self-regulation found in the literature; there are two exceptions worth noting. First, most successful programs exist in areas of regulation restricted to single industries, and not across the economy as the literature suggests. Second, claims of cost savings in theory are not substantiated in practice. Although agencies use cost savings as a justification for individual self-regulation, documented cost savings are rare.

The findings from the surveys even more strongly confirm the essential elements for successful programs. By and large, all are present in each; and in the case of programs which were terminated, aborted, or never implemented, we can identify at least one of the essential elements as missing.

The study concludes that audited self-regulation is a valuable regulatory technique, and that it should be systematically considered by departments and agencies when developing or revising regulatory programs. Nonetheless, mandating such consideration by regulators will likely yield poor results, since agencies predisposed to regulatory reform will do so in any event. Therefore, the study concludes that further publicity be given to audited self-regulation: the essential prerequisite elements of the industry, agency and regulation, and the required elements of fair process for a successful program. Once regulators are aware of the utility of this regulatory technique, they may put it to profitable use, simultaneously enhancing their efficiency as well as the public interest.

Introduction

"Self-regulation" seems at first blush to be self-contradicting.[1] If government regulation of an industry or problem[2] is considered necessary, how can that responsibility be then returned to those from whom it was taken? Notwithstanding this apparent contradiction, audited self-regulation[3] is successfully used by federal regulatory agencies. However, it is apparently adopted on an *ad hoc* basis: in one industry or application but not in another which possesses similar characteristics.[4] This study reviews and evaluates these previously uncollected efforts in audited self-regulation to evaluate the general usefulness of this regulatory technique across industries or applications.[5] These insights would be relevant not only to reform of current federal agency regulation,[6] but also to design of new programs as well, as new programs of self-regulation are continuously appearing.[7]

---

[1] *See* BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION 15 (1980) (noting that self-regulation "would seem to be a paradoxically titled form").

[2] "Government regulation," for purposes of this study, is defined as federal government regulation of an entity by legislation and implementing regulations of either an independent or Executive Branch agency. Government regulation as so defined is usually created to cover all aspects of a particular industry (banking, meat packing) or an identified problem or issue across all industries (workplace safety, environmental protection, fair competition). *See* ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 44-45 (1983). For further definitions and general description of the scope of this study, see *infra* Part I.

[3] "Audited self-regulation" is defined *infra* Part I.A.

[4]
> Many different programs have been tried — by federal agencies, by state and local agencies, and by governments overseas. We have built up what lawyers call "case law:" lots of useful precedents about what works and what doesn't. The trouble is that, unlike case law, these precedents aren't easy to find. Congressional staff or agency employees designing new programs have no systematic way to find out what has been tried before and how well it has worked.

Al Gore, From Red Tape to Results: Creating a Government that Works Better and Costs Less; Report of the National Performance Review 117 (1993).

[5] *See* Paul L. Joskow & Roger C. Noll, *Regulation in Theory and Practice: An Overview* in STUDIES IN PUBLIC REGULATION 40 (Gary Fromm ed. 1981) (noting that "[v]ery little research is available on the comparative outcomes of different regulatory institutions," and that "to those who believe some regulation is desirable or simply inevitable the absence of guidelines on how to accomplish it most efficiently is an important void in scholarly research"). Joskow and Noll describe as part of a research agenda, goals similar to this study.

> Viewing regulatory commissions as organizations and concentrating on the process of regulatory decisionmaking gives useful insights into what is actually happening. The attempts to model and understand regulation from this perspective often give researchers a more complete static and dynamic structural model of regulation rather than just a reduced form. For those interested in incremental policy reform within the context of prevailing institutions as well as exploring possible institutional alternatives, such structural models are extremely useful for positive policy analysis.

Id. at 53.

This study concludes that, within specific limits, experience has shown that audited self-regulation is a useful technique which should be considered in a systematic fashion by government agencies when formulating regulatory policies. Part I defines and narrows the term "audited self-regulation" to a scope capable of careful inquiry, and distinguishes other related forms of regulation. Part II discusses the potential advantages and limitations of audited self-regulation. Part III extrapolates from these advantages and limitations the characteristics of the regulation, agency, industry and self-regulatory organization which suggest that self-regulation would be successful. In addition, Part III discusses the principal legal requirements of such programs. Part IV is a survey of federal agencies'[8] use or attempted use of audited self-regulation in administration of their statutes, with an evaluation of each against the principles described in Parts II and III. Part V combines the theories of Parts II and III with the programs surveyed in Part IV to distill essential elements of a successful program of audited self-regulation. Finally, Part VI considers the options for achieving the systematic consideration of the use of audited self-regulation.

---

[6] In October 1993, President Clinton issued Exec. Order No.12,866, which directs federal agencies to, among other things, "identify and assess alternative forms of regulation." 58 Fed. Reg. 51,375, 51,376 (1993). *See also* GORE, *supra* note 4, at 8 ("Our goal is ... to reinvent the way the government does everything. It is not simply to produce a more efficient government, but to create a more *effective* one.") (emphasis in original).

[7] The Food and Drug Administration adopted in 1993 interim rules for certification of mammographers, relying on private accrediting bodies. *See* 58 Fed. Reg. 67,558 (1993). The use of self-regulation remains under active consideration by the FDA. Telephone interview with Morris Bosin, FDA Planning Office, Feb. 7, 1994. The Federal Energy Regulatory Commission is also considering a program relying in part on self-regulation. *See* Transcript of Proceedings, Plenary Session of the Administrative Conference of the United States, Dec. 10, 1993, at 13.

Outside of the dozens of self-regulatory organizations surveyed in this study, there are hundreds of organizations which operate on a completely voluntary basis outside of any federal mandate. And new programs are created constantly; a few recent examples suggest the variety. Both industry and environmental groups are seeking to establish programs to oversee chemical companies' programs of community awareness and emergency response to accidents, and are looking for models at the self-regulatory efforts in the hospital accreditation and nuclear power industries, discussed *infra* Part IV.B.1 & IV.C. Emma Chynoweth & Karen Heller, *Wanted: A System to Audit Care,* CHEMICAL WK., June 17, 1992, at 28. A private foundation is considering alternatives for a program of self-certification of safety by motor carriers. Telephone interview with David Madsen, Volpe National Transportation Systems Center, July 1, 1993. And banks and financial institutions have historically been prolific in self-regulation in areas where control is necessary and profitable but government regulation lacking. *See* David G. Oedel, *Private Interbank Discipline,* 16 HARV. J.L. & PUB. POL'Y 327 (1993).

[8] The following independent agencies and Executive Departments were surveyed for this study: Department of Agriculture (Agricultural Marketing Service, Animal and Plant Health Inspection Service, and Food Safety Inspection Service), Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Department of Education, Environmental Protection Agency, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Trade Commission, Department of Health and Human Services (Health Care Financing Administration), Department of Labor (Occupational Safety and Health Administration), National Indian Gaming Commission, Securities and Exchange Commission, Department of Transportation (Federal Aviation Administration), Department of the Treasury (Office of the Comptroller of the Currency, and Office of Thrift Supervision).

I. Definition of "Audited Self-Regulation"

A. Types of Regulation Included

Each component of the term "audited self-regulation" is subject to a wide variety of interpretation. This study focuses only on a subset of those interpretations, namely, one which provides a useful model for study and extension. In order to define "audited self-regulation," each term is explained separately below.

"Regulation" as distinguished from other modes of government activity is the alteration of behavior of persons by the federal government.[9] Furthermore, that alteration is accomplished by "the imposition of rules ... backed by the use of penalties."[10] For purposes of this study, a "penalty" includes a denial of conditional government benefits.[11] The terms "rules" and "penalties" in turn suggest that the essential activities of federal regulation are the creation and enforcement of rules.

"Self-regulation" is the delegation of the power to create and enforce rules to an entity outside the federal government. These entities, often known as "self-regulatory organizations" or SROs, are composed principally of regulated entities and their representatives. The source of the delegated authority is in each instance a federal agency to which Congress has itself delegated such authority with permission or command to delegate it further.[12] However, because wholesale creation and enforcement of rules is not and likely cannot[13] be passed off by Congress or agencies to other groups, the scope of delegated activity is limited to what is here defined as the "implementation" of rules. Implementation includes the authority to interpret rules imposed by the agency or Congress, to make new rules within the scope of delegated authority, if any, and to enforce these rules by imposing penalties for their violation.[14] Thus, "self-regulation" for purposes of this study is defined as the delegation of power to implement federal laws or federal agency regulations by the federal government to a non-governmental entity.

---

[9] A broader definition would include as a regulator any entity not directly involved in the activity in question. *See* MITNICK, *supra* note 1, at 4-7; FRED THOMPSON & L.R. JONES, REGULATORY POLICY AND PRACTICES: REGULATING BETTER AND REGULATING LESS 8 (1982). This study is concerned only with the federal government as regulator.

[10] THOMPSON & JONES, *supra* note 9, at 12. This distinguishes regulation from government activities such as persuasion, taxation, direct expenditure or public ownership. *See id.* at 9.

[11] Thompson and Jones exclude "direct expenditures" from their definition of "regulation," but they use the term direct expenditures to refer apparently to unconditional benefits: "grants, subsidies, and transfer payments to individuals and to firms." THOMPSON & JONES, *supra* note 9, at 9. A penalty for failure to comply with a regulation is not distinguishable for purposes of this study from the denial of a benefit for failure to comply with a condition of that benefit.

[12] Express congressional authorization of a self-regulatory program is an essential component of a successful program. *See infra* notes 484-487 and accompanying text. Direct delegation by Congress to a private group is ordinarily accompanied by review of that private group by a federal agency (itself with delegated powers) rather than by Congress directly. *See* David A. Lipton, *The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for Securities Markets*, 16 U.C. DAVIS L. REV. 527, 538-40 (1983) (delegation of authority to securities exchanges and

"Audited" self-regulation is the exercise of this delegated power subject to review by a federal agency.[15] The term "audit" is not used in strict reference to the functions performed by independent public accountants in opining on financial statements, but that function is a useful analogy. The federal agency

---

associations, subject to review by the Securities and Exchange Commission). For a fuller discussion of the development of regulation of the securities industry, *see infra* Part IV.A.1.

[13] See *infra* Part III.B.1 for a discussion of the limitation on Congress' ability to delegate its functions, known as the "nondelegation doctrine."

[14] The addition of enforcement power is necessary to make the function "regulation" at all. *See supra* note 10 and accompanying text. The statement that agencies themselves enforce rules departs, of course, from a strict "separation of powers" theory of government. Davis, however, succinctly disposes of any reliance on such a theory in defining the role of administrative agencies.

> Except for the clear facts that the main legislative power is in Congress, the main executive power in the President, and the main judicial power in the courts, an outstanding characteristic of the American government is the non-separation of the three kinds of powers.
>
> .... .
>
> A thousand questions of [legislative-executive-judicial] classification could be asked that are ... difficult (or impossible) .... .
>
> To the extent that we have avoided such unnecessary questions, we have done well. And we have escaped from a strict version of the theory of separation of powers. Our legislative bodies have conferred all three kinds of powers — and more — on our administrative agencies, and our courts have not disapproved.

1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 72-74 (2d ed. 1978).

[15] Congress does not performs this "auditing" function directly; *see supra* note 7 and accompanying text. Indirect review by Congress takes place through hearings on new legislation, appropriations for the agency, or on general oversight. *See* LITAN & NORDHAUS, *supra* note 2, at 62-66. They conclude that Congressional oversight is "generally weak and highly sporadic." *Id.* at 66. Cary gives a different assessment, however, after describing the same basic methods of Congressional review.

> [I]t seems clear that regulatory agencies do not have so much power as they are thought to have. Collectively, as a group of commissions, they do cover a wide spectrum of cases involving many industries and companies within them. .... However, as far as any policy making by an agency is concerned, it seems clear that any major move is subjected to minute scrutiny by Congress.

WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES 58 (1967). And in specific areas, Congress can be extremely effective in oversight, even to the point of directing an agency to retain rules it believes unwise or illegal. *See* Susan L. Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation,* 76 GEO. L.J. 59 (1987).

relies on information produced by the SRO, but verifies that the processes used by the SRO are sound, that those processes are complied with, and occasionally examines the information directly to spot-check its accuracy.[16] But the essence of "self-regulation" as defined in the above paragraph is that the "audit" itself is not a complete review of every action taken by the SRO. In the course of its review, the agency retains the power to require new methods to be used by the SRO and residual regulatory authority over the regulated entities themselves. Thus, this power of "audit" can be defined as the retention by the delegating agency of powers of review and independent action. As used in this study, the term "self-regulation" always refers to "audited self-regulation" in contrast to purely private and voluntary self-regulatory efforts.

Putting the parts of each of these paragraphs together completes the definition. "Audited self-regulation" is defined as the delegation of power to a non-governmental entity, by Congress or a federal agency, to implement laws or agency regulations, with powers of review and independent action retained by a federal agency.

B. Other Types of Regulatory Reform Distinguished

This definition of audited self-regulation delineates a particular area of government regulation which is a current focus of regulatory reform efforts. Other closely related areas are distinguished below.

Congress and federal agencies frequently delegate to private standard-setting bodies the setting of specifications, features, contents, tolerances, and so forth of various things subject to regulation.[17] The key distinction, however, is that these standards are voluntary; compliance is not mandated without some action by a federal agency.[18] Of course, "voluntary" standards which are virtually universally recognized may have much the same impact as government-mandated standards.[19] However, without explicit enforcement by the government, these voluntary standards lack an essential attribute of "self-regulation."[20] And when standards are adopted in federal regulations, enforcement remains with the agency adopting the standard; thus the standards themselves are not "self-regulation" in any meaningful sense.

---

[16] This is analogous to the evaluation by an auditor of the internal control structure of the entity whose financial statements are being audited. Prior to testing and verifying the actual records of the entity, an auditor is required to evaluate the internal control structure of the entity to confirm the extent to which those underlying records have been accurately produced.

> Tests of controls directed toward the operating effectiveness of an internal control structure policy or procedures are concerned with how the policy or procedure was applied, the consistency with which it was applied during the audit period, and by who it was applied. These tests ordinarily include procedures such as inquiries of appropriate industry personnel, inspection of documents and reports indicating performance of the policy or procedure, observation of the application of the policy or procedure, and reperformance of the application of the policy or procedure by the auditor.

CODIFICATION OF STATEMENTS ON AUDITING STANDARDS §319.35, Statement on Auditing Standards No. 55 (Am. Inst. of Certified Pub. Accountants, 1989).

[17] "The private sector of the economy invests extensive resources each year in developing and revising written standards for products, materials, systems, services, processes, and practices. ... . In their totality, nongovernmental standards concern virtually every aspect of modern society. They exist in bewildering variety and serve many purposes." Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1331 (1978) (ACUS Recommendation 78-4). Hamilton estimated in 1978 that there were at least 60,000 such standards then in use. *Id.* at 1332.

Regulation of entry into and practice of professions and occupations is pervasive in state and local governments.[21] Typically, the legislature designates a board of appointed private citizens to certify entry and to restrict practice in the trade.[22] This regulatory scheme is distinct from audited self-regulation in two

---

[18] The scope of agency adoption of voluntary standards and the processes of adoption were the subjects of Hamilton's investigation. *See id.* at 1446-84. *See also* Office of Management and Budget Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Standards," 47 Fed. Reg. 49,496 (1982) [hereinafter *OMB Circular*] (adopting new policies for agencies in using voluntary standards for regulatory and procurement purposes).

[19] *See* American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 570 (1982) (characterizing ASME, a standards-setting body, as "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce," quoting Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465 (1941)). A Federal Trade Commission staff report concluded that "private standards and certification can be used to exclude competition or to convey deceptive and misleading information, to the substantial detriment of consumers and the competitive process." BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STANDARDS AND CERTIFICATION 65 (1983) [hereinafter FTC STAFF REPORT]. The Department of Justice raised similar concerns in its response to the Office of Management and Budget's policy on the use of standards. *See OMB Circular, supra* note 18, at 49,499, quoting letter to OMB from the Department of Justice that "private [standard-setting] activity is not, by virtue of governmental participation or approval, shielded from the antitrust laws." Not only might failure to comply with "voluntary" standards result in a competitive disadvantage, but there is also a risk of legal liability if the noncompliant product or process resulted in injury.

> An unanswered question at this time is the extent to which such standards are actually enforced in some way by each of these private organizations or otherwise become effective indirectly because noncompliance would result in a greater likelihood of liability in product-liability suits or other litigation brought by persons whose interests have been injured.

MICHAEL S. BARAM, ALTERNATIVES TO REGULATION: MANAGING RISKS TO HEALTH, SAFETY AND THE ENVIRONMENT 58 (1982).

[20] Enforcement is an essential element of regulation; *see supra* note 10 and accompanying text. The extent to which that enforcement may occur through illegal nongovernmental means is not relevant to the present typology and analysis of regulation by lawful governmental enforcement.

[21] *See* Baram, *supra* note 19, at 62 (noting that "over 550 occupations are now licensed in the United States").

[22] A survey of Alabama law indicates the pervasiveness of this type of regulation.

> Designed to regulate every aspect of professions, licensing statutes are frequently amended; the drift of the amendments is increased regulation and complexity. Most statutes define the practice of the occupation regulated, criminalize unlicensed practice,

broad respects. First, it lacks a self-regulatory organization outside of the board or agency; there is no membership organization or private group involved in regulation.[23] Second, the delegation by the legislature to the appointed board is typically complete; the regulation is not "audited" by the legislature which delegates the authority.[24] Such unsupervised delegation has no federal counterpart, and raises different legal issues not applicable to audited self-regulation.[25]

> create a board of examiners for the occupation, and establish licensing, revocation, and appeal procedures.

Note, *Professional Self-Regulation*, 29 ALA. L. REV. 679, 683 (1978).

[23] It could be argued that the profession or trade being regulated is the "self-regulatory organization," since that group is normally the chief sponsor of the occupational regulation in question as well as the group normally involved, at least indirectly, in implementation. *See* BENJAMIN SHIMBERG ET AL., OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 12 (1973) ("A significant characteristic of most occupational licensing is that the regulatory agency is usually composed of practitioners from the trade or profession in question. The impetus for licensing has seldom if ever come from the public in response to a demonstrated need, but rather from associations of practitioners who have usually sought themselves to secure the passage of regulatory legislation."). However, the members of the profession are not given formal control (outside of board membership) over the regulatory process in contrast to the models of self-regulation in this study, although some of the Medicare PROs discussed *infra* Part IV.B.1.c. may lack membership organizations, *see infra* note 368 and accompanying text. This is not to say that the informal control is not important or powerful. Occupational licensing generally has been frequently criticized as collusion thinly coated with a faint public interest. *See, e.g.*, Jonathan Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976), SHIMBERG, ET AL., *supra*, at 13-14.

[24] "Once a profession acquires from a legislature the exclusive right to regulate entry, it is expected to regulate itself thereafter to some extent." BARAM, *supra* note 19, at 62. Supervision may be available through the courts by a statutory appeal or by a writ of mandamus, *see* Note, *supra* note 22, at 687 nn. 49-50. Supervision by the legislature could also occur, *see supra* note 15, but such actions are entirely discretionary. There is no systematic review of the delegate's activity comparable to the "audit" discussed *supra* Part I.A. However, in some states the occupational regulation is centralized in one agency, and in some cases that central agency supervises licensing boards. *See* DOUG ROEDERER & BENJAMIN SHIMBERG, OCCUPATIONAL LICENSING: CENTRALIZING STATE LICENSURE FUNCTIONS 4-5 (Council of State Governments Report No. 683, 1980) (describing two models from six states of occupational licensing involving partial or total control by state agencies over licensing boards). Although this involves "auditing" in the sense intended in this study, the underlying activity is nonetheless not "self-regulation." *See supra* note 23.

[25] There are typically three legal issues involved in an occupational licensing and regulation statute. First, the extent of the state's power to interfere with otherwise private activity may be questioned; *see* Note, *supra* note 22, at 686-96. Second, assuming the legislature possesses the power to regulate the activity in question, its ability to delegate that power to a private group may be limited. This is a vital question in state constitutional law though it has long passed to a state of some somnolence on the federal level. *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 649-50 (1986) (criticizing the state court decisions in this area and noting that "[p]rivate exercise of federally delegated power is no longer a federal constitutional issue."). For a fuller discussion of the validity of federal delegation, see *infra* Part III.B.1. Third, antitrust laws may affect the validity of these boards' actions. *See infra* Part III.C.1 (issues regarding professional organizations generally); RANDOLPH P. REAVES, THE LAW OF PROFESSIONAL LICENSING AND CERTIFICATION 287-93 (2d ed. 1993) (issues regarding state occupational licensing agencies in particular). Many other issues are involved in the

Regulators often recruit "delegates" to certify compliance by regulated entities with applicable standards or regulations. If the qualifications of these "delegates" are determined and enforced by a private organization, this would be a program of audited self-regulation, and several are discussed below.[26] However, where the "delegates" are qualified directly by the agency itself, clearly no self-regulation is involved. Nor is the action of the delegate appropriately considered self-regulation, because the degree of supervision by the agency is significantly greater. For example, the Federal Aviation Administration certifies individuals to conduct inspections, tests and training in various areas of pilot and aircraft certification,[27] and the Department of Agriculture certifies veterinarians to make various inspections, examinations and certifications under animal health statutes and regulations.[28] The impetus in both areas is primarily a shortage of federal employees to perform these functions.[29]

Self-regulation is also distinct from a weaker form of regulation: "self-reporting" in the absence of a self-regulatory organization. This is distinct from true self-regulation because the regulated entity is usually given little or no power to interpret any regulation, but merely reports as required by the regulation. And enforcement of the regulation, of course, is limited to the government, except to the extent that a regulated entity "enforces" a law or regulation upon itself through compliance. Self-reporting is a common regulatory technique. Banks, for example, periodically report on their financial condition, disclosing whether they are in compliance with required capital adequacy standards.[30] Regulation of air pollution relies to a large extent on "emissions reduction credits" determined, monitored and traded by holders of those credits.[31] Holders of permits to

---

application of the regulatory statutes; *see generally, id.* (discussing practice issues in licensing, application and disciplinary proceedings).

[26] *See, e.g., infra* Part IV.A.4 (accountants) and Part IV.B (accrediting organizations).

[27] *See* 14 CFR §§183.1 - .33.

[28] *See* 7 CFR §§160.1 - 162.13.

[29] Regarding delegation under the Federal Aviation Act, "[t]he legislative history of the statute indicates that the purpose of this delegation was to avoid a substantial increase in the number of Federal employees." Andrew J. Dilk, *Negligence of Federal Aviation Administration Delegates Under the Federal Tort Claims Act*, 42 J. AIR L. & COM. 575, 575 (1976). Regarding delegation to "accredited veterinarians," the Department of Agriculture regulations state that the accreditation program "is intended to ensure that an adequate number of qualified veterinarians are available in the United States to perform [the specified activities]." 9 CFR §161.1(a).

[30] *See* 12 USC §1817(a)(3) (quarterly "reports of condition" required of all financial institutions whose deposits are insured by the Federal Deposit Insurance Corporation).

[31] Under the Clean Air Act, discharge of pollutants is limited by various overlapping regulations. The EPA's program of emissions reduction credits is a series of economic incentives made available to regulated entities to make compliance with these provisions easier and more flexible. The regulated entities can themselves determine the best methods of compliance with the EPA air standards, and by their reports disclose their compliance or noncompliance with the overall standards. *See generally,* Emissions Trading Policy Statement, 51 Fed. Reg. 43,814 (1986), Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989),

discharge water pollution report regularly on the content of the discharged water, disclosing thereby whether they are in compliance with the terms of their permits.[32] Similarly, a program during the mid-1980s of allowing refiners to trade "rights" to add lead to gasoline required reports by each refiner on the amount of "rights" held, used, purchased, sold or saved.[33] Perhaps most familiar is the annual report by each taxpayer of income and tax, disclosing thereby compliance with the tax laws.[34]

Audited self-regulation is distinct from a much larger concept known generally as "privatization."[35] Techniques and issues involved in removing government functions entirely from the public sector may begin with self-regulation but quickly move far beyond it.[36]

And of course, as a technique of regulatory reform, audited self-regulation is distinct from deregulation, which ordinarily means removal of regulation altogether.[37] Deregulation, simply defined, is the removal of regulation. And

---

RICHARD A. LIROFF, REFORMING AIR POLLUTION REGULATION (1986), THOMAS H. TIETENBERG, EMISSIONS TRADING (1985).

[32] Under the Clean Water Act, the primary method of regulating discharge of pollutants is the issuance by the EPA or approved state programs of permits to discharge. *See generally* 2 LAW OF ENVIRONMENTAL PROTECTION §12. 05[2] (Sheldon M. Novick et al. eds. 1993). Absent such a permit, any discharge of any pollutant is unlawful. *See* 33 USC §1311(a). Each permit holder is responsible for monitoring its own discharge and reporting the results thereof. *See* 40 CFR §122.41(*l*)(4). If those reports disclose that the terms of a permit have been violated, the permit holder may face significant penalties, either in private litigation or administrative proceedings. *See* Frank M. Thomas, Jr., *Citizen Suits and the NPDES Program: A Review of Clean Water Act Decisions,* 17 ENVTL. L. REP. 10,050 (1987) (discussing enforcement of permit conditions through private litigation); 33 USC §1319(g) (administrative penalties).

[33] Under Section 211(c)(1)(A) of the Clean Air Act, 42 USC §7545(c)(1)(A), the EPA may control the production of any fuel additive "which may reasonably be anticipated to endanger the public health or welfare." The lead rights program entitled a refiner to rights based on the amount of leaded gasoline produced and the current EPA standards for lead, which were diminishing during the course of the program. If the actual lead content was too high, excess rights had to be obtained; if the lead content was lower than permitted, the excess rights could be sold or saved. *See* Regulation of Fuel and Fuel Additives, Final Rule, 47 Fed. Reg. 49,322 (1982); Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice,* 16 ECOLOGY L.Q. 361, 381-83 (1989).

[34] *See* I.R.C. §6001 (general requirement of recordkeeping and returns).

[35] *See generally,* Ronald C. Moe, Privatization: An Overview From a Public Administration Perspective (Congressional Research Service Rept. No. 88-201 GOV, March 2, 1988).

[36] *See id.* at 5 (listing "methods for privatization" of "divestitures (selling) of corporate bodies; contracting-out for the performance of services; imposition of user fees; use of vouchers; awarding of franchises; and voluntarism").

[37] MITNICK, *supra* note 1, at 418. *See generally*, Richard B. Stewart, *Reconstitutive Law,* 46 MD. L. REV. 86 (1986) (describing reconstitutive law as an alternative in the middle of a continuum between proscriptive regulation on one end and deregulation on the other). Reconstitutive law, defined as "federal reconstruction of the decisional rules and structures that constitute the several institutional subsystems that make up the greater society," *id.* at 87, would include audited self-regulation as well as the other regulatory reform methods discussed in this section.

regulation, in turn, is the alteration of behavior by the government.[38] Since audited self-regulation by definition assumes a continuing governmental role,[39] it is not deregulation.

II. The Comparative Advantage of Audited Self-Regulation

This Part lays the general background against which audited self-regulation can be evaluated. In general, this method of regulation offers comparative advantages in implementing certain types of regulation, and its potential drawbacks can be limited.

A. Advantages of Audited Self-Regulation

Lawyers, economists and political scientists have created a diverse literature on government regulation. Overall, they have identified five distinct advantages of audited self-regulation over other regulatory techniques. First, rules can be more effective because of the self-regulator's superior knowledge of the subject compared to the government agency. Second, self-regulation allows for more diversity in methods of compliance with legal rules than is possible for a government agency to provide. Third, self-regulation may result in better compliance with rules, no matter who promulgates them or how they are designed, because self-enforcement is more effective and more easily accepted by the regulated entities. Fourth, self-regulation can result in cost savings to the government; and these savings may be greater than the costs imposed on private groups, thus resulting in less costly regulation overall. And finally, self-regulation is consistent with modern regulatory reform characterized by the retreat from bureaucratic "command and control" methods of regulation.

1. Technical Expertise

Private organizations are by their nature comprised of individuals or groups with an interest in and knowledge of the subject area around which they are organized. This makes them useful repositories of expertise to which government regulators can turn. Indeed, this is a primary motivation for government use of private standard setting organizations.[40] Self-regulatory organizations typically begin with "the development of common policies and standards," progressing to monitoring compliance with those standards, and often but less frequently to enforcement of those standards.[41] It is more efficient for government to rely on that collected expertise than to reproduce it at the agency level.[42]

---

[38] *See supra* note 9 and accompanying text.

[39] *See supra* note 15 and accompanying text.

[40] *See* Roberta S. Karmel, *Securities Industry Self-Regulation — Tested by the Crash,* 45 WASH. & LEE L. REV. 1297, 1306 (1988) (noting expertise created by higher salaries, and the ability to achieve consensus in rulemaking); BARAM *supra* note 19, at 53 ("private industry invests considerable resources

2. Flexibility

A product of the expertise of self-regulators is that they retain the ability to modify their rules in response to technological change more readily than the government agency.[43] More importantly, however, the self-regulator is better able to determine when a rule may be changed to result in better compliance apart from any change in technology. The bureaucratic organization of government agencies and the rigid requirements imposed on their rulemaking inhibit innovation and response to subtle changes in the environment of the regulated entities.[44] The regulated entities retain a more informal structure and the desire created by competition to keep their rules current and cost-effective.[45] This is an especially important advantage of self-regulation because the regulatory initiatives of the past few decades have created rules which cut across industry lines. These are difficult for an agency to implement by general rules applicable to all situations, but better suited to individual rules designed and implemented by each regulated entity.[46]

---

each year in developing and revising its own standards"); Hamilton, *supra* note 17, at 1377 (private committees have "an expertise that probably cannot be matched by the technical staffs of most, if not all, agencies"); Lawrence, *supra* note 25, at 656-57 ("Private delegation may be a practical method of obtaining that sort of otherwise unavailable expertise"); Lipton, *supra* note 12, at 546 (in regulation of certain aspects of stock exchanges, each "would be most familiar with the unique trading structure and needs of its own market"); Thomas P. Grumbly, *Self-Regulation: Private Vice and Public Virtue,* in SOCIAL REGULATION: STRATEGIES FOR REFORM 110 (Eugene Bardach & Robert A. Kagan eds. 1982) (discussing incentives for reform of meat and poultry inspection, one of which was "the fundamental argument that an objective assessment of critical production points carried out by industry personnel could provide *better* consumer protection than a program in which [federal] inspectors ... made subjective determinations").

[41] KENNETH E. YOUNG, ET AL., UNDERSTANDING ACCREDITATION 59-60 (1983).

[42] The agency will need sufficient expertise in any area in which it regulates to assure the reliability of the delegates' expertise on which it relies, however. And in some areas, the agency may be the source of that expertise. In general, the decision should be made by the entity which can acquire the knowledge in the most cost-effective fashion. *See* Lipton, *supra* note 12, at 545.

[43] *See* Hamilton, *supra* note 17, at 1378.

[44] *See* Karmel, *supra* note 40, at 1305-06; Lawrence, *supra* note 25, at 654-55.

[45] *See* Karmel, *supra* note 40, at 1306; EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 241 (1982) (noting that private decisionmakers will be sensitive to the adverse consequences of overzealous regulation and "are more likely to resist literal interpretations of the rules, to accept substantial compliance, and to fight for discretion when the requirements are inappropriate or unduly burdensome in particular cases"). *See also* BARAM, *supra* note 19, at 58.

[46] *See infra* Part II.A.5 (discussing reliance on self-regulation as an effective means of implementing modern regulatory statutes).

It is possible that the auditing function may reintroduce bureaucratic inflexibility through agency rules not concerning substantive requirements but rather the rulemaking process itself.[47] Thus, the maintenance of flexibility at the regulated entity level requires some amount of residual expertise at the agency level as well.

3. Incentives for Compliance

Self-regulation has the potential to provide greater incentives for compliance. As shown above, self-regulation is likely to produce rules from an expert's knowledge base, tailored to the conditions of the particular industry or workplace. The rules therefore are perceived by the regulated entities, because of their participation, as more "reasonable" from the outset compared with the more inflexible counterparts issued by government regulators.[48] In addition, certain types of conduct are more effectively regulated by the regulated entity itself.[49] Thus, incentives are increased not because the regulated entity is now suddenly more willing to comply,[50] but because compliance has become easier (less costly) and has been recognized as consistent with and not impairing or opposing the entity's goals.

---

[47] Bardach and Kagan follow this process to its logical extreme, resulting in virtual replacement of the self-regulator's rules with agency rules.

> The more regulators or advocacy groups mistrust the motivation of the self-regulating enterprises as a class, or the more regulatory inspectors lack the expertise to evaluate a particular self-regulation system, the more likely they will insist that the enterprise adhere strictly to the written procedures.
>
> The result, of course, is that government "guidelines" come to be treated as binding rules and privately formulated procedures come to be treated with the same legal sanctity as direct government regulations.

BARDACH & KAGAN, *supra* note 45, at 236-37 (1982).

[48] *See* BARDACH & KAGAN, *supra* note 45, at 102-19 (describing how technical regulations create resentment, minimal compliance, lack of cooperation and resistance on the part of the regulated entities); Lawrence, *supra* note 25, at 653 (describing advantages of "pluralism" in self-regulation); Richard W. Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROBS. 663, 678 (1964) ("[I]ndustry self-government surely is psychologically more acceptable to the industry regardless of cost. No one likes external controls, least of all businessmen. Opportunity to participate in the regulatory process makes it much more palatable."); Tamar Hed-Hoffman, *The Maloney Act Experiment*, 6 B.C. INDUS. & COM. L. REV. 187, 210-12 (1965). *But see* BARDACH & KAGAN, *supra*, at 219 (cautioning that even the private inspectorate "tends to occupy an outsider or even pariah status").

[49] Consider ethical standards of broker-dealers, for example. Although there is no particular structural reason explaining the difference between "ethics" rules of the Securities and Exchange Commission (the government agency) and the National Association of Securities Dealers (the self-regulatory organization), "in its role of self-regulator of the interrelationships of its members, the NASD has promoted ethical standards of conduct. As a result, the securities business carries out its contractual obligations much more promptly than required by law and performs contracts even in cases where the law does not impose an obligation to perform." Hed-Hoffman, *supra* note 48, at 210. *Accord,* Karmel, *supra* note 40, at 1304. During hearings on the legislation which was to become a key piece of securities industry self-regulation, *see infra* Part IV.A.1, SEC Commissioner George Matthews testified

> "[E]ven if the funds were furnished for a direct government regulatory program, and even if an adequate staff were provided ... a great many of the abuses in the securities business are not matters of definite illegality; they are matters of ethics ... .

4. Cost Savings to the Federal Government

Self-regulation can result in cost savings to the government if the resulting supervision of regulation requires fewer resources than direct regulation. Although the savings should be readily quantifiable, such calculations are made only rarely.[51] Such cost savings would be a net societal gain, of course, only if the net increase in costs to the industry were lower than the government's cost savings.[52] However, it is possible

---

> There is a vast field for the control of ethical practices in this business, which is not a field which the Government can very well occupy."

SUBCOMM. ON COMMERCE & FINANCE, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, SECURITIES INDUSTRY STUDY, H.R. REP. NO. 1519, 92d Cong., 2d Sess. 82 (1972) [hereinafter SECURITIES INDUSTRY STUDY], quoting SEC Commissioner George Matthews. *See also* Jeffrey R. Cohen & Laurie W. Pant, *Beyond Bean Counting: Establishing High Ethical Standards in the Public Accounting Profession,* 10 J. BUS. ETHICS 45, (1991) (surveying accountants, finding that they believe self-enforcement of ethical standards is more effective than imposing such standards by government regulation).

[50] Most regulated entities possess an "inherent" willingness to comply with even direct government regulation. Anecdotal evidence suggests compliance rates of 80-90%. *See* BARDACH & KAGAN, *supra* note 40, at 65-66 ("Reflecting on his experience as Office of Price Administration administrator during World War II, Chester Bowles said that 20 percent of the regulated population would automatically comply with any regulation simply because it is the law of the land, 5 percent would attempt to evade it, and the remaining 75 percent would go along with it as long as they thought the 5 percent would be caught and punished. In practice, OSHA relies to a great extent on the presumption that businesses, once apprised of their legal obligations, will abide by the law."). "Experienced regulators acknowledge that if most regulated enterprises were inclined to comply only when the threat of inspection and punishment was imminent, then the entire regulatory program would quickly collapse." *Id.* at 60. One study of OSHA enforcement reviewed existing literature on deterrence, concluding that "[r]eviews of empirical studies have found only weak evidence that detection and punishment is a primary factor in deterring noncompliance. The complexity of perceptual processes that intervene between the threat or experience of legal sanctions and illegal actions may weaken the link between enforcement activities and deterrence ... ." Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement,* 27 LAW & SOC'Y REV. 177, 178 (1993) (citations omitted).

[51] For example, the Securities and Exchange Commission estimated savings of approximately $400,000 from the 1983 transfer of direct regulation to the National Association of Securities Dealers of the few remaining small broker-dealers who were not already members of and regulated by the NASD or an exchange. H.R. REP. NO. 106, 98th Cong., 2d Sess., at 6 (1983). And the Commodity Futures Trading Commission estimated the initial savings from the creation of the National Futures Association to regulate futures traders at approximately $3.5 million in direct savings and over $16 million in additional costs avoided over the first three years of the program. COMMODITY FUTURES TRADING COMMISSION, NATIONAL FUTURES ASSOCIATION: REPORT TO CONGRESS UNDER SECTION 237 OF THE FUTURES TRADING ACT OF 1982, at 132-33 (1985) [hereinafter CFTC REPORT].

[52] Neither the SEC nor the CFTC studies, *supra* note 51, attempted to measure the additional compliance costs incurred by the self-regulatory agencies. Karmel, *supra* note 40, suggests that "[t]o the extent that self-regulation can operate more casually and without regard to constraints that are imposed upon government regulators, self-regulatory organizations may achieve goals more efficiently and at a lower cost." *Id.* at 1305. Jennings, *supra* note 48, however, estimates that "it is at least doubtful that the

to argue that such costs should have been borne by the regulated entities in any event, as are most costs of regulation, and thus the net savings to the federal government is a good even if viewed in isolation.[53] The solution to limiting government-imposed costs of regulation on private individuals and industry, it is argued, would be to budget this resource as with direct government expenditures.[54]

5. A Cornerstone of Regulatory Reform

Audited self-regulation has the potential to lead modern regulatory reform. Regulatory legislation in the past 30 years has shown a dramatic shift in the scope of the government's role in society. The agencies' inability to correspondingly shift their methods of regulation has been the source of the almost universal discontent with their performance. Self-regulation is widely regarded by researchers as having great potential to produce effective results from the sweeping mandates of modern legislation.

Controls over corporate and social conduct enacted by Congress since the 1960s differ fundamentally from those enacted in the other two great regulatory periods in American history: the Progressive Era[55] and the New Deal.[56] Each of the earlier episodes focused federal regulation on particular industries or discrete segments of the economy.[57] However, the third period, from the mid 1960s to the late 1970s,[58] was unique in its focus on consumer and environmental protection

---

existing two-tier structure [of direct regulation and supervised self-regulation in the securities industry] costs less than direct regulation." *Id.* at 678.

[53] The supporting theory is that the majority of firms in a regulated industry would comply, and incur the costs of compliance, without government direction or enforcement in any event. *See* BARDACH & KAGAN, *supra* note 45, at 66.

[54] See, *e.g.*, the proposals for a "regulatory budget" in LITAN & NORDHAUS, *supra* note 2, at 133-58, and THOMPSON & JONES, *supra* note 9, at 176-89.

[55] The reforms of the Progressive Era date approximately from 1900-15. *See David Vogel, The "New" Social Regulation,* in REGULATION IN PERSPECTIVE 156 (Thomas K. McCraw ed. 1981); Thomas K. McCraw, *Regulatory Change, 1960-79, in Historical Perspective,* in JOINT ECONOMIC COMMITTEE, 96TH CONG., 2D SESS., SPECIAL STUDY ON ECONOMIC CHANGE Vol. 5, Government Regulation: Achieving Social and Economic Balance 8-9 (1980) [hereinafter SPECIAL STUDY ON ECONOMIC CHANGE] (dating this period through 1921, but listing the 19th Amendment as the only significant "regulatory" effort after 1914). Others begin earlier; *see* Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189, 1216 (1986) (dating this period beginning with the Sherman Antitrust Act in 1890).

[56] Rabin, *supra* note 55, at 1243-53, Vogel, *supra* note 55, at 156-57, and McCraw, *supra* note 55, at 8, date the period of New Deal reforms from 1933-38.

[57] There are exceptions, of course. There were significant reforms, for example, in the labor movement and in the electoral system during both periods. And the Progressive Era resulted in many other reforms on the state and local level. *See* Vogel, *supra* note 55, at 160; McCraw, *supra* note 55, at 9-10.

[58] Vogel, *supra* note 55, at 157-58, dates the period from 1964-77; McCraw, *supra* note 55, at 12, from 1960-79. Others date the period generally from the mid-1960s to the middle or late-1970s. *See* Paul W. MacAvoy & Dorothy M. Tella, *The Impact of Regulation on the Performance of Industry,* in *Special*

across any recognized industry lines.[59] The third period also far eclipsed the other two in the number of programs begun and new agencies created.[60]

The resulting almost universal dissatisfaction with the agencies' implementation of these new laws is traced by most researchers to the resilience of the "command and control" method of regulation used in the older, single-industry, price-and-entry regulatory schemes.[61] This regulatory technique responded well to the original problems addressed, namely, the rise of near-monopolies in many industries.[62] However, the new regulation of the 1960s and 1970s, dealing with different types of market failures across different industries, does not fit with the "command-and-control" technique. Identifying individual problems and their solutions via agency rule is impossible because of the sheer

---

Study on Economic Change, *supra* note 55, at 187-88; Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 339 (1990); CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 2 (1977).

[59] *See* Rabin, *supra* note 55, at 1278-84 (describing the roots of a primarily environmentalist and consumer movement he titles "The Public Interest Era"). *See also* A. Lee Fritschler, *The Changing Face of Government Regulation*, in FEDERAL ADMINISTRATIVE AGENCIES: ESSAYS ON POWER AND POLITICS 40 (Howard Ball ed. 1984) (comparing pre-1960s "[i]ndustrial and economic regulation [which] generally had a well-defined and narrow focus" to the post-1960s social regulation which "focuses less on the formal means and output of production and more on the side effects of production"); Vogel, *supra* note 55, at 162 (observing that new laws "cut across industry lines," "undermining much of the historic distinctions between regulated and unregulated industries"); McCraw, *supra* note 55, at 5 (noting that the across-the-board coverage of new laws does not mean the impact has been uniform; rather there has been a disparity between large and small firms and other varieties of classification within industries "to such a differential extent that it has changed the basis of competition within those industries").

[60] Vogel's comparisons are illustrative.

> From 1900 through 1965, only one regulatory agency was established at the federal level whose primary responsibility was to protect either consumers, employees or the public .... Between 1964 and 1977, ten federal regulatory agencies were created with this as their mandate ....
>
> .... In the broad area of consumer safety and health, five new laws were enacted by the federal government during the Progressive Era, eleven during the New Deal, and a total of sixty-two between 1964 and 1979. Job safety and other working conditions were the focus of a total of five pieces of national legislation during both the Progressive Era and the New Deal; from 1960 through 1978, twenty-one laws were approved in this area. Two statutes regulating energy and the environment were enacted by the federal government during the Progressive Era, five during the New Deal, and thirty-two during the most recent period of increased government intervention.

Vogel, *supra* note 55, at 161-62. *See also* LITAN & NORDHAUS, *supra* note 2, at 44 (counting over 40 pieces of "social legislation" during the 1960-76 period); Fritschler, *supra* note 59, at 41-43 (table listing five Progressive Era programs and ten New Deal programs, with one in each era categorized as "social regulation," and 23 programs from 1962 through 1975, with 17 categorized as "social regulation").

[61] *See, e.g.*, Stewart, *supra* note 58, at 341; McCraw, *supra* note 55, at 7 & 17, SCHULTZE, *supra* note 58, at 46.

[62] *See* MacAvoy & Tella, *supra* note 58, at 178-79; THOMPSON & JONES, *supra* note 9, at 52-53 (but disputing the translation of these economic rationales into regulatory practice).

magnitude of individual problems. Moreover, any general rule destined for cross-industry application will have its absurd results.[63]

A major benefit of the "command-and-control" technique has been its ability to limit discretion in enforcement. This is a heralded value generally in American government.[64] In addition, the predisposition for legalistic rules — specific standards, allegations of violations, and a trial-type adjudication of the facts — was apparent from the lawyers who had from the beginning controlled the field.[65] This technique also had the political advantage of immediate response; once a problem had been identified, a law could be passed and an agency constituted to promulgate regulations immediately.[66] The regulated entities would have the benefit of certain rules, limiting the discretion of the agency, and the regulators and reformers would have the benefit of an impressive array of citations issued under the new law, demonstrating its benefits.[67]

In the late 1970s, however, the preeminence of "command-and-control" began to deteriorate.[68] The rules issued had been demonstrated as largely ineffective, particularly when compared with their costs.[69] The limitation of agency discretion through the promulgation of precise rules led in many cases to ineffective regulation.[70] The proliferation of cross-industry agencies with no requirement of coordination resulted in businesses subject to multiple and often contradictory commands.[71] In addition, economists had entered the scholarly debate along with the lawyers,[72] advocating and demonstrating that regulation based on standards of output rather than characteristics of input, can be more efficient.[73] And the delegation of power to agencies bent on specific rules became self-sustaining, as there remained no political check on the use of agency power.[74]

---

[63] *See* Stewart, *supra* note 58, at 343 (observing that because "[b]ureaucrats in Washington simply cannot gather and process the vast amount of information needed to tailor regulations," they "adopt uniform regulations that are inevitably procrustean in application").

[64] *See, e.g.*, McCraw, *supra* note 55, at 7 ("Lawyers and political scientists ... emphasize administrative structure, political feasibility, and due process of law. They hold these values dear, and they expressed them in such laws as the Administrative Procedure Act of 1946."). *See generally* KENNETH C. DAVIS, DISCRETIONARY JUSTICE (1969).

[65] *See* THOMPSON & JONES, *supra* note 9, at 103-04; LITAN & NORDHAUS, *supra* note 2, at 95 ("[w]e characterize such a regulatory philosophy, which simply orders that which is broken to be fixed, as the 'lawyer-regulator's approach' to regulation"); McCraw, *supra* note 55, at 6; SCHULTZE, *supra* note 58, at 73.

[66] *See* MITNICK, *supra* note 1, at 361 (comparing "incentive" and "directive" regulation, concluding that the latter may be the response of choice in a crisis situation); THOMPSON & JONES, *supra* note 9, at 104 ("alternatives that involve incentives for performance change may seem indirect and may not have the [political] appeal of an immediate 'solution'"); MacAvoy & Tella, *supra* note 58, at 187 ("equipment and design standards were appealing because they tended to speed up the regulatory process and thus allowed the agencies to show more evidence of regulatory activity").

[67] *See* BARDACH & KAGAN *supra* note 45, at 34-36.

[68]

> By the late 1970s ..., the expansionist period of the Public Interest Era had ... run its course. For the first time in a century, a discernible political movement sought to reassess the need for regulatory programs that administered markets as a means of promoting the health of particular institutions. This movement was exceedingly widespread: The regulatory system came under close scrutiny by policy institutes and journals, academic disciplines, and politically influential public officials who all came to focus on a clear and dominant emerging theme — deregulation.

Rabin, *supra* note 55, at 1316.

[69] What is particularly important about this criticism is that it came not only from the regulated entities but the interest groups responsible for passage of the regulations in the first place. *See* MacAvoy & Tella, *supra* note 58, at 176-77.

---

[70]

> As rules extend into increasingly complex areas of our environment, workplace safety, health and social rights, their consequences — both deliberate and unintended — also grow. As this happens, we introduce more and more safeguards into the rulemaking process. The result is not always what we want. Hearings, reviews, revisions, more reviews, more hearings, and even more reviews are cumbersome, costly, and time consuming.

GORE, *supra* note 4, at 118. *See also* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 38 (1978) (noting that while the limitation on discretion was originally intended and hailed as a protection of freedom, "for the individual who must relate to them, usually in a role of subordination or dependence, bureaucracies too often appear concerned primarily with formalistic adherence to their own rules, rather than with seeking a personalized response to the peculiarities of his specific circumstances"); BARDACH & KAGAN, *supra* note 45, at 30-57, review the development of this legal environment, and conclude that stricter statutes providing for tough sanctions without discretion increases the power of enforcement officials but also "the incidence of unreasonableness and unresponsiveness." *Id.* at 57. *See also* Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 413-15 (1990) (demonstrating how reliance on stringent standards leads to the paradox that "overregulation produces underregulation"); MacAvoy & Tella, *supra* note 58, at 187 (proscription of inputs by regulation "meant that regulation dealt with matters once-removed from the aims of the legislation and, probably largely for this reason, was destined to have far less impact than was hoped on accident rates or the quality of the environment"); SCHULTZE, *supra* note 58, at 74 (applying "command-and-control" approach is not appropriate for complex forms of social intervention with output-oriented legislation; "Regulations, however detailed, cannot be written to cover all the individual situations that arise.").

[71] *See* LITAN & NORDHAUS, *supra* note 2, at 44-49; MacAvoy & Tella, *supra* note 58, at 187.

[72] *See* McCraw, *supra* note 45, at 6-7 (describing the historical influence over regulatory philosophy, in turn, of lawyers, political scientists, and finally classical economists).

[73] *See, e.g.*, THOMPSON & JONES, *supra* note 9, at 81-82 (concluding that in only one of four conditions for beneficial regulation, antitrust, is it "unambiguously" the best option, and that reliance on market-based incentives is likely superior under the other three conditions); LITAN & NORDHAUS, *supra* note 2, at 94-98 (discussing the rise of economists' critiques of regulatory policy, demonstrated through numerous studies). Even the traditional antitrust regulation has begun to yield to the economists' suggested use of market-based incentives. *See* Elizabeth E. Bailey and William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111 (1984).

[74] This is what Stewart hails as the source of "Madison's nightmare."

> Rather than offsetting each other through mechanisms of countervailing power, as Madison envisaged, these [interest] groups have instead divided power among themselves. This parcelling of power has been accomplished through congressional delegations of authority to functionally specialized bureaucracies. ... .
>
> ....
>
> The post-New Deal constitutional jurisprudence of majoritarian politics has helped produce this result, because the demands for national regulatory and spending programs have outstripped the capacity of the national legislative process to make

Lawmakers and administrators began to cautiously accept the demise of "command-and-control" regulation. Ironically, the first changes came in traditional single-industry price-and-entry regulation.[75] Eventually, the administrators of "social" regulation began experimenting with output standards instead of input standards, specifying results to be reached and leaving the method of achieving those results to the regulated entities.[76] Thus began the broader acceptance of alternative methods of regulation.[77]

Audited self-regulation thus promises to be a fundamental part of regulatory reform in the foreseeable future. If properly implemented, it promises efficient reorganization of regulation to meet the challenges ahead.[78]

B. Disadvantages of Audited Self-Regulation

The same researchers and analysts have identified three principal potential shortcomings of audited self-regulation. First, because the regulated entities are left directly or indirectly in charge of implementation, self-regulation raises the possibility of not only inadequate enforcement of a regulatory program but also concerted anticompetitive conduct in opposition to the program's goals.[79]

> decisions that are accountable and politically responsive to the general interest. This has subverted the very premises of Madisonian politics.

Stewart, *supra* note 58, at 342. The judiciary, he adds, has only compounded this problem by retreat from review of such issues, as judges claim, without enthusiasm, "the superiority of the political process for resolving issues of social and economic policy." *Id.* at 348. *See also* Sunstein, *supra* note 70, at 434-37 (criticizing reviewing courts' unwillingness to interpret regulatory statutes to require cost-benefit balancing, concluding that this leads to counterproductive overregulation); SCHULTZE, *supra* note 58, at 74 ("[B]y applying the principle and technique [of detailed regulation with adjudication of individual cases] to situations in which social intervention must be pervasive and continuing, we have ended up extending the sphere of detailed governmental control far beyond what is necessary to accomplish the objectives we seek.").

[75] *See* MacAvoy & Tella, *supra* note 58, at 193-94 (discussing deregulation of prices by the Civil Aeronautics Board and the Federal Power Commission).

[76] In the area of environmental regulation, one commentator characterized "command and control" regulation as having four components: (1) writing general rules, (2) writing specific permits, (3) operating in compliance with permits, and (4) enforcement, with only the third under the control of private parties. In most environmental contexts, he notes, "this pure command and control approach has now been altered at least modestly" as "[e]xisting law has granted private parties varying degrees of influence over each of the steps in which government is the prime actor." Barry Breen, *Beyond Command and Control Regulation: Innovative Approaches to Environmental Protection* in 1 LAW OF ENVIRONMENTAL PROTECTION §3.07[2][a] at 3-51 (Sheldon M. Novick et al. eds. 1993).

[77] Stewart, *supra* note 58, at 352, recognizes that "reconstituting" regulatory laws to "steer the overall tendency of institutions' decisions in the desired direction without attempting to dictate particular outcomes in every situation" is the most promising solution to existing regulatory inefficiency "of the centralizing command and control techniques relied upon so heavily in recent decades."

[78] Stewart, *id.* at 355-56, suggests that two "powerful external constraints" on command-and-control regulation will force future reliance on other modes of regulation: the political constraint on increased federal spending and the need to maintain international competitiveness.

[79] *See, e.g*, Grumbly, *supra* note 40, at 98.

Second, even if the self-regulator conducts itself properly and implements the program vigorously, regulation by its nature increases the amount of unreviewable discretion exercised by the self-regulator and even the auditing agency itself. Finally, there are political limitations on the scope and types of regulation which Congress would likely permit to be delegated, no matter how efficient that delegation might be in theory.

1. Inadequate Enforcement

Leaving the regulation to the regulated brings the possibility that an agency could be thereby or was already "captured"[80] by the subject industry. It might thereby subvert the regulatory goals to its own business goals, when the purpose of the regulation in the first place was premised on some market failure.[81] It is widely asserted that even the agencies themselves are subject to significant interest-group pressure,[82] and that pressure could be expected to be even greater upon a group composed itself of industry members. Even with the best of intentions, industry members or self-regulatory groups may be unwilling to commit the resources which vigorous self-enforcement would require.[83]

Furthermore, since any effective industry self-regulatory body consists almost by definition of a large combination of members, any activity taken in concert to standardize their conduct, however wholesome, runs the risk of violation of the antitrust laws if it produces injury to competition.[84] This is a point often raised by antitrust enforcement agencies[85] and the courts as well.[86]

---

[80] For a summary of the political and economic theories of capture, see MITNICK, *supra* note 1, at 206-33 (with evidence suggesting "some support" for capture theories), THOMPSON & JONES, *supra* note 9, at 95-101 (describing development of economists' "supply and demand" theory of regulation) and BARDACH & KAGAN, *supra* note 45, at 44-45 (describing the capture theory as "a tenet of academic political science"). The avoidance of capture was a frequent goal of the social legislation of the 1960s and 1970s. *Id.* at 45.

[81] Bardach & Kagan, *supra* note 45, make the somewhat contradictory point that self-regulation can become as burdensome, as fraught with legalistic rules and as ineffective as direct regulation. However, they seem to lay the fault mostly at the feet, again, of the government regulators, who impose unreasonable procedural requirements in place of the unreasonable substantive rules. *See id.* at 234-38.

[82] *See* ROGER G. NOLL & BRUCE M. OWEN, THE POLITICAL ECONOMY OF DEREGULATION 29-41 (1983) (using "interest group" model of the regulatory process, concluding each regulation is beholden to the interest group which originated or currently controls it). Sunstein, *supra* note 70, at 426-28, calls this the regulatory paradox that "independent agencies are not independent." He notes that this is not necessarily more true of independent agencies than executive agencies, however, but the potential is certainly greater. *Id.* at 427-28

[83] *See* Karmel, *supra* note 40, at 1310 ("Vigorous policing by self-regulators of their own members is inherently difficult. Furthermore, [where self-regulators] compete against each other ..., it is extremely difficult for one ... to uphold a standard that a competitor does not enforce."); BARDACH & KAGAN, *supra* note 45, at 219 ("firms may not be induced to hire professional specialists in quality control or safety or environmental protection, or, if they do, to give them any intracorporate clout"); Sam S. Miller, *Self-Regulation of the Securities Markets: A Critical Examination*, 42 WASH. & LEE L. REV. 853, 862 (1985) ("SROs generally do not appear to have any greater access to industry expertise than their governmental counterparts.").

2. Exercise of Unreviewable Discretion

Self-regulation entirely discards what was supposed to be one of the major advantages of "command-and-control" regulation, namely, the adherence by the implementing agency to strict rules and regulations, thereby furthering the fundamental American tenet of reliance on "the rule of law."[87] This is also a source of one of the perceived advantages of the process, however, namely, the ability of the implementing officials to tailor enforcement to particular industries or practices, thereby making it more effective.[88]

It is impossible to predict in the abstract whether an increase in discretion is likely to lead to overregulation or underregulation as measured against any politically or economically "ideal" amount. Pressures push both ways on the decisionmaker, and the results would be very fact-dependent.[89] It is also impossible to reconcile the benefits of more discretion with the perceived harm of unreviewable discretion.[90] The solution lies in properly reviewing and limiting the discretion, not eliminating it altogether,[91] or in simply realizing that the exercise and control of agency discretion is a constantly evolving or revolving phenomenon with no one proper result for any agency or type of regulation.[92]

---

[84] *See* FTC STAFF REPORT, *supra* note 19, at 254-68 (describing how even voluntary standard-setting programs can result in unfair practices and unfair methods of competition); Miller, *supra* note 83, at 867 ("Negative impact on competition may be the most severe drawback of self-regulation.").

[85] *See supra* note 19 and accompanying text.

[86] See *infra* Part III.C.1 for a discussion of how to design self-regulation to best avoid antitrust concerns as expressed by courts.

[87] *See supra* note 64 and accompanying text.

[88] This advantage was cited by critics of command-and-control regulation's inevitable production of broad regulations unsuitable for use by any regulated entity. *See supra* notes 70-71 and accompanying text.

[89] For example, Miller, *supra* note 83, at 860-64, demonstrates how both could happen even in the same agency. "Paradoxically, SROs are charged with providing insulation from more effective government regulation as well as with a tendency to overregulate." *Id.* at 860.

[90] This problem arises not only from a philosophical standpoint of what amount of discretion is acceptable, but from a practical standpoint of designing efficient rules. *See* Colin S. Diver, *Regulatory Precisiôn*, in MAKING REGULATORY POLICY 202-05 (Keith Hawkins & John M. Thomas eds. 1989) (describing the countervailing considerations of "transparency, congruence, and simplicity" in writing efficient rules).

[91] Davis summarizes the contradictions and the solution.

> A rule of law must permit needed discretionary power. It should not eliminate or try to eliminate all discretionary power. ... . Discretion is indispensable for individualized justice, for keeping law abreast of new conditions and new understanding, for new governmental undertakings for which rules have not yet been developed, and for some programs for which no one knows how to write rules.
>
> A main goal of a rule of law should be to eliminate *unnecessary* discretionary power. American law and practice are shot through with discretion that can and should be eliminated.

3. Political Restrictions on Delegation

In some areas of protective regulation, it is simply unnecessary to ask even hypothetically if a particular problem be delegated to self-regulators. Though Congressional oversight of agencies and their programs is often limited, there are clearly topics beyond peradventure.[93] No matter how efficient banks or industry groups might be, Congress would certainly not consider turning any portion of safety and soundness inspections over to the industry in the wake of the savings and loan and bank failures of the 1980s and 1990s.[94]

DAVIS, *supra* note 14, at 115. The unnecessary discretion, he continues, can be checked in among other ways by providing guiding standards when rules are not feasible, and by requiring open statements of standards, findings, reasons for action and adherence to precedent when discretion is exercised. *Id.* at 115-17. BARDACH & KAGAN, *supra* note 45, caution that supervision of self-regulation can result in documentation concerns and responsibilities. *Id.* at 238-39.

[92] Keith Hawkins and John M. Thomas, *Rule-Making and Discretion: Implications for Designing Regulatory Policy* in MAKING REGULATORY POLICY, *supra* note 90, at 263-78, review DAVIS, *supra* note 64, and other scholars' works on discretion, concluding:

> The regulatory process is populated by bureaucracies intent on avoiding criticism, since after all they are government agencies whose policies reflect external political demands. To fail to recognize this dynamic is to assume that an optimal degree of discretion can be defined and structured.
>
> … .
>
> In addition to the well-known constraints of the external political environment, the exercise of discretion is a function of the type of decisionmaking task and the professional values of officials. As a consequence, it is highly problematic to control and change the amount of discretion in the regulatory process.

Id. at 272-73.

[93] William Cary, generalizing from his experience as Chairman of the Securities and Exchange Commission, concluded that "[i]t may seem lacking in courage, but I believe it is safe to conclude that agencies seldom take controversial steps under their rule making power which do not have some support from Congress." CARY, *supra* note 15, at 53.

[94] *See* U.S. DEP'T OF THE TREASURY, MODERNIZING THE FINANCIAL SYSTEM: RECOMMENDATIONS FOR SAFER, MORE COMPETITIVE BANKS Pt. IV (1991) (proposing, in addition to capital maintenance and insurance reforms, increased and improved supervision). *But see* Oedel, *supra* note 7 (describing early banking self-regulation). There are other examples. One is the Federal Communications Commission's "fairness" doctrine. *See generally* Bloch, *supra* note 15. Another is the Department of Agriculture's meat inspection system. Although physical inspection of each animal slaughtered is required by law, *see* 21 USC §§604-605, such inspection is not effective in identifying bacterial infestations which are today considered a primary cause of foodborne illnesses. Nonetheless, Congress rebuffed the Department's attempts to modify the physical inspection system, ultimately removing all funding for the program. *See FSIS to Withdraw SIS But Reproprose Cattle Inspection Charges*, FOOD CHEMICAL NEWS, Aug. 3, 1992; Daniel P. Puzo, *Does Streamlined Beef Inspection Work?*, L.A. TIMES, June 18, 1992, p. H37. The vitality of this impression was demonstrated by the Department's response to the January 1993 outbreak of illness and deaths apparently linked to contaminated beef sold in Washington fast food restaurants. The initial response was to require additional

III. Elements of Effective Audited Self-Regulation

Part II, in describing the development of self-regulation and its attendant advantages and disadvantages, suggests that certain characteristics of an industry, regulatory agency and regulatory statute are required for self-regulation to be effective. These are summarized in Part A below. In addition, various provisions in the Constitution require that the self-regulatory process provide fundamental procedural fairness; these are discussed and applied in Part B below. Finally, Part C discusses the design of a self-regulatory system to avoid, to the extent possible, liability under antitrust or tort law doctrines.

In general, the following conclusions are reached. First, the private entity to which self-regulatory authority is granted must have both the expertise and motivation to perform the delegated task. Second, the agency staff must possess the expertise to "audit" the self-regulatory activity, which includes independent plenary authority to enforce rules or review decisions of the delegated authority. Third, the statute must consist of relatively narrow rules related to output-based standards. It may be either inter- or intra-industry in scope, but should not be limited to traditional rate-and-entry regulation. Finally, the agency's and delegated authority's decisions must observe rules of notice, hearing, impartiality, and written records of proceedings and decisions.

A. Characteristics of the Industry, Regulation, and Agency

1. The Industry

The most important component of effective self-regulation is, of course, the industry itself,[95] or group of industries subject to the regulations.[96] There must be within each firm or an organized industry group individuals able and willing to implement the regulations at hand.

Ability requires expertise. There is no evidence that government is inherently able to attract better experts than private industry or industry groups. What is required is a preexisting investment by the industry in human and

---

inspectors in the slaughterhouses, despite the current inability to test for micro-organisms. *See generally,* Carole Sugarman, *U.S. Meat Inspections Come Under Scrutiny,* WASH. POST, Feb. 9, 1993, Health section, at 9; Richard Gibson & Scott Kilman, *Tainted-Hamburger Incident Heats Up Debate Over U.S. Meat-Inspection System,* WALL ST. J., Feb. 12, 1993, at B1.

[95] *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION 305-06 (1984) (concluding that "[f]or all parties who seek to understand regulation, the most important single consideration is the appropriateness of the regulatory strategy to the industry involved").

[96] In the case of the newer inter-industry regulations, it is difficult to conceive of a particular "industry" save for the regulatory experts to be conscripted for self-regulation, for example, safety engineers or environmental officers at the thousands of different worksites and emissions sites subject to regulation.

perhaps physical capital as well, with the capability to translate the government mandated general standards into firm-specific rules to produce the desired results.[97]

More importantly, the regulated entities must be motivated to comply. This motivation can be supplied by a preexisting professional group which performed many facets of self-regulation,[98] by the spotlight of public scrutiny from interest groups of workers, consumers or others,[99] or by the industry's recognition that effective regulation is in its own economic self-interest.[100] In addition, incentives can be created by the self-regulatory program itself, if it is carefully designed to increase certainty of regulatory outcomes, simplify the process, and provide measurable benefits to outweigh the "startup" costs of implementing and internalizing the new regulatory scheme.[101] Indeed, the roots of self-regulation lie in the spirit of government-industry cooperation in the 1920s, created from the compulsory regulation of many of those same industries during World War I.[102] A meaningful grant of autonomy in the self-regulation arrangement will itself serve to motivate.[103] There may be a certain amount of "inherent" motivation,[104] though this will serve mostly to assure compliance with the regulations once adopted. Of course, in instances where direct government regulation, however cumbersome, is a realistic alternative, it must be always present in the minds of the regulated entities.[105] Whether the initial force is external or internal,[106] the result must be a genuine willingness on the part of the industry to effectively implement the regulation.

---

[97] *See supra* notes 40-42 and accompanying text.

[98] This was the case with many of the self-regulatory programs discussed below; *see infra* Part IV.A.1 (securities exchanges), Part IV.B.1.a (hospital accreditation), and Part IV.B.2 (college and university accreditation).

[99] Vogel, *supra* note 55, at 171-75, notes a significant difference of the social regulation of the 1960s and 1970s from that before it in that it was largely imposed on the regulated with outside support from citizen and consumer groups. *See also* Alfred W. Blumrosen, *Six Conditions for Meaningful Self-Regulation*, 69 A.B.A.J. 1264, 1269 (1983) ("Only in this situation will the regulated institutions believe that regulation is permanent.").

[100] *See, e.g*, MCCRAW, *supra* note 95, at 201-02 (contrasting the approaches taken by the Securities and Exchange Commission in regulating over-the-counter dealers, where it had the industry's cooperation, and in reorganizing public utility holding companies, where it had the industry's virulent opposition).

[101] *See* Michael H. Levin, *Getting There: Implementing the "Bubble" Policy,* in SOCIAL REGULATION: STRATEGIES FOR REFORM 59, 90-91 (Eugene Bardach & Robert A. Kagan eds. 1982). Indeed, one measure of a regulatory program which is a good candidate for self-regulation is that it is currently so unwieldy that it would yield such incentives upon reform.

[102] *See* Ellis Hawley, *Three Facets of Hooverian Associationalism: Lumber, Aviation and Movies, 1921-30* in REGULATION IN PERSPECTIVE 97-101 (Thomas K. McCraw ed. 1981) (referring to the programs of Secretary of Commerce Herbert Hoover, building on the initiative of private enterprise demonstrated during World War I).

[103] *See* Gerald P. Berk, *Approaches to the History of Regulation*, in REGULATION IN PERSPECTIVE 197 (Thomas K. McCraw ed. 1981) (citing as examples the period of "Hooverian associationalism" discussed in Hawley, *supra* note 102, and the self-regulation of the over-the-counter securities market by the National Association of Securities Dealers since 1939).

[104] Even with direct government regulation, the rate of voluntary compliance is ordinarily high. *See supra* note 50 and accompanying text.

Effective implementation, in turn, means that the "incentive" to comply must not be created by making other groups worse off who are the intended beneficiaries of the regulatory program in the first place. In rate-and-entry regulation, for example, industries are perceived as having monopolistic powers and consumers as unprotected. There is little reason to expect significant self-regulation in traditional rate-and-entry regulation, as it is the cooperation in pursuit of self-interest which is the source of the public injury in the first place.[107]

2. The Regulation

It is apparent from Part II that self-regulation is related primarily to the "social" regulation of the 1960s and 1970s. The major characteristics of those laws are their application across industry lines and the typical focus on "internalizing externalities" in the economic sense, that is, requiring industries to account for costs of production previously unmeasured, such as pollution, unsafe working conditions, unsafe products and the like. It is precisely these types of laws that can be implemented in a uniquely efficient manner by industry because they affect the costs of production, which are complex factors unique to each firm. On the other hand, these "externalities" can be effectively "internalized" only if the costs can be efficiently transferred to industries, something the industry will not like. This is why traditional health and safety regulation has been considered a poor candidate for self-regulation, so long as consumer and labor groups are unable to provide a check on management's motivation to comply with the regulation when it has no economic incentive to do so.[108]

---

[105] *See, e.g.*, Blumrosen, *supra* note 99, at 1267 ("Meaningful self-regulation will be undertaken when the regulated community perceives that it is the lesser evil.") This concept is the source, in federal regulation of securities exchanges and broker-dealers, of the popular historical references to the "big stick" or the "shotgun behind the door" in characterizing the government's reserved powers of direct regulation. *See, e.g.*, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. NO. 95, 88th Cong., 1st Sess., pt. 4, at 501-02 & 693-98 (1963). *See also infra* part III.A.3 (residual authority of the agency).

[106] Blumrosen, *supra* note 99, at 1269 (suggesting that the best incentive for self-regulation in employment discrimination law comes from a combination of pressures from the regulating agency for reports and compliance plans and from the public in the form of residual liability).

[107] This is the type of regulation primarily done by the Interstate Commerce Commission, Federal Maritime Commission, Federal Communications Commission and formerly by the Civil Aeronautics Board and Federal Power Commission. Regulation of rates and service typically involves two groups diametrically opposed in a "zero-sum" negotiation over the price, which makes that type of regulation a poor candidate for self-regulation. Telephone interview with Gerald Vaughn, Deputy Bureau Chief for Operations, Common Carrier Bureau, FCC (Feb. 26, 1993). *But see* Bailey & Baumol, *supra* note 73 (market-based regulation possible even in traditionally near-monopolistic industries).

[108] Telephone interview with Neil Eisner, Assistant General Counsel for Regulation and Enforcement, Department of Transportation (Dec. 7, 1992).

In addition, the requirements of the law must be objectively stated, ideally in terms of output requirements or standards.[109] An objective statement of standards allows the self-regulators to measure, and the agency to review, their performance concretely in the same terms as the legal requirements.[110] This also reduces the amount of unreviewable discretion (both by the regulators and the reviewing agency) to a minimum consistent with standards which are still sufficiently adaptable to be realistic.[111] However, the desire for specificity should not deteriorate into "command-and-control" minutiae.[112]

3. The Agency

The most important characteristic of the agency, apart from its legislation discussed above, is expertise.[113] Each of the areas of potential self-regulation requires the "auditors" to have technical knowledge sufficient to evaluate compliance, as well as a knowledge of how to test compliance itself.[114] And there will remain inevitable discretion to be exercised even in supervision of compliance with the clearest standards.[115] Furthermore, discretion is required in the agency's own exercise of its reserved enforcement powers. The agency must take sufficient independent action to motivate self-regulation without stifling it.[116] Expertise in discretion is difficult to identify,[117] but it is necessary.[118]

---

[109] *See* DAVID SCHEONBROD, POWER WITHOUT RESPONSIBILITY 143 (1993) ("instead of complicated laws, the federal government should enact simple laws that would help private arrangements to work better"). He suggests four characteristics of a statute which provides adequate direction: (1) it provides "a clear answer" in most cases; (2) by resolving most cases, it indicates the weight the legislature gives to conflicting goals; (3) courts, rather than agencies, have the final say in interpretation; and (4) it must be changed by legislation. *See id.* at 183. Moreover, providing such "clear answers" does not mean that Congress' need replicate agency regulatory efforts through legislation. *Id.* at 135.

[110] *See* Blumrosen, *supra* note 99, at 1268 (for self-regulation to be effective, standards must be established by law and the results to be achieved must be measurable).

[111] *See* Diver, *supra* note 90, at 226 (demonstrating that concrete guidelines are especially important in "[p]rograms administered on a highly decentralized basis"). Rules enforced through self-regulation would likely fit in this category.

[112] *See* BARDACH & KAGAN, *supra* note 45, at 236-37 (indicating the ease with which agencies could replace unworkable detailed substantive standards with unworkable detailed procedural requirements for meeting substantive standards); SCHULTZE, *supra* note 58, at 87-88 (cautioning that incremental replacement of "command-and-control" with incentive-based regulation is essential to its success).

[113] *See* Grumbly, *supra* note40, at 116 (concluding that if an agency's technicians are not held in high regard by the industry, "any move toward self-regulation may have to be accompanied by substantial efforts to upgrade the regulators' technical and scientific proficiency").

[114] One reviewer of the Securities and Exchange Commission's regulation of securities exchanges confirmed this need.

> SRO [self-regulatory organization] initiative dampens SEC initiative to develop capacity to review SRO actions in a meaningful way. The SROs, though considered public institutions under the law, view investor and public interest through the lens of their members' welfare. Self-regulation thus makes the regulator's task both simpler and more difficult.

Walter Werner, *The SEC as a Market Regulator*, 70 VA. L. REV. 755, 779 (1984).

B. Procedural Requirements

Part A above developed as paradigms the elements of the industry, the regulations, and the industry necessary for effective self-regulation. This part discusses legal rules of procedural fairness applicable to any program of group self-regulation.

1. The Nondelegation Doctrine

The Constitution limits the ability of Congress to delegate its lawmaking function to others. This limitation is broadly referred to as the nondelegation doctrine. The only certainties about the nondelegation doctrine are that it lacks a precise constitutional foundation,[119] it is incapable of precise formulation and application,[120] and that it is doubtful whether it even exists at all.[121]

---

[115] For example, agencies must avoid impatience in adopting incentive-based regulation which may create instead a replica of the prior command-and-control system. *See supra* note 112 and accompanying text.

[116] Blumrosen, *supra* note 99, posits requirements for successful self-regulation which hinge on these discretionary abilities. *See id.*, at 1268 ("A vigorous enforcement program must exist to provide incentives for self-regulation"); *id.* at 1269 ("Administration and interpretation must support and encourage self-regulation").

[117] Successful supervision of self-regulation requires the ability to "exploit the natural incentives of regulated interests to serve particular goals that the regulators themselves have carefully defined in advance." McCraw, *supra* note 95, at 309.

[118] *See* Lipton, *supra* note 12, at 541-48 (developing rules in securities regulation for determining whether duplicate authority should be exercised in a specific instance by the agency or by the self-regulatory authority, but acknowledging that they are not comprehensive and that their "application often requires a subjective interpretation of a regulatory problem").

Paradoxically, although the nondelegation doctrine is perhaps nonexistent, the principles underlying it have always been clear: "Administrators should not have unguided and uncontrolled discretionary power to govern as they see fit."[122] The fundamental question is thus not whether Congress may delegate its power; clearly it may do so.[123] Rather, due process is the main issue.[124] Although the process due in each case cannot be stated in the abstract,[125] the law does or sound public policy should[126] in each case provide fundamental process rights. These include rulemaking with broad participation by all affected groups,[127] disqualification of decisionmakers who have conflicting interests,[128] and adjudication on notice, with an opportunity to be heard, following binding general rules, and with explicit findings and reasons.[129]

---

[119] "The nondelegation doctrines are derived from the separation of powers principle, which is implicit in the structure of the Constitution." Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 187 (1989). The specific constitutional foundations are the vesting of legislative power in the Congress in the first sentence of Article I and the vesting of executive power in the President in the first sentence of Article II, *see* Harold J. Krent, *Fragmenting the Unitary Executive*, 85 NW. U.L. REV. 62, 71-72 (1990), and the vesting of judicial power in the courts as well in the first sentence of Article III. *See* Abramson, *supra*, at 194-97. Courts rely on other grounds equally, however, including the Due Process Clause as well as antitrust laws. *See* Abramson, *supra*, at 199-208 (procedural due process and state action), George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 656-57 (1975) (state action and antitrust law); Stewart, *supra* note 58, at 343-44 (discussing the development of "new subconstitutional principles of administrative law to replace the now waning separation of powers jurisprudence").

[120] *See, e.g.*, Abramson, *supra* note 119, at 208 (commingled concepts resulting in "murky rationales" from the Supreme Court); DAVIS, *supra* note 14, at 160 (charging that limits on delegation are "so vague as to be meaningless"). Interestingly, the most severe criticism is usually reserved for cases discussing delegations to private parties. *See* Krent, *supra* note 119, at 94 (such delegations "coexist with our current understanding of the separation of powers doctrine only uneasily, at best"); Abramson, *supra* at 187 n. 124 (citing various commentators referring to delegation to private parties as "not crystalliz[ing] any consistent principles," "largely confused and unprincipled," and "a conceptual disaster area").

[121] *See* DAVIS, *supra* note 14, at 150 ("the nondelegation doctrine has ... no reality in the holdings"); Stewart, *supra* note 58, at 350 (reinvigorating classic nondelegation doctrines would "amount to a constitutional counterrevolution"), Lawrence, *supra* note 25, at 649 ("Private exercise of federally delegated power is no longer a federal constitutional issue."). The recent cases invalidating analogous Congressional innovations, Bowsher v. Synar, 478 U.S. 714 (1986) and INS v. Chadha, 462 U.S. 919 (1983), do not, strictly speaking, involve delegation of legislative, executive or judicial power, but rather attempts by Congress to expand its powers beyond those granted by Article I. *See* Krent, *supra* note 119, at 77-78.

[122] DAVIS, *supra* note 14, at 206. He continues: "But the courts have found by experience that that purpose cannot be accomplished through the traditional nondelegation doctrine." *Id.*

[123] *See id.* at 149-50. This is as true of delegation to public agencies or employees as to private groups, as decisions under the nondelegation doctrine have not distinguished between delegations to government employees and those to private parties. *See* Krent, *supra* note 119, at 69; Abramson, *supra* note 119, at 210. *But see* SCHOENBROD, *supra* note 109, at 135 ("The Supreme Court has said that time limitations require Congress to delegate but supports this conclusion only with the observation that the federal government does delegate.").

[124] *See* DAVIS, *supra* note 14, at 207 (purpose of the doctrine should be "protection against unnecessary and uncontrolled discretionary power"); Abramson, *supra* note 119, at 209 & n.260 (many commentators have suggested replacing the nondelegation doctrine with the Due Process Clause).

[125] The specific requirements themselves are unclear, and in the case of private parties, there is the threshold question of the existence of "state action" making the private activity subject to constitutional

2. Due Process Requirements

An alternative source of process requirements is the Fifth Amendment, which applies to nongovernmental entities only if they are engaged in "state action" involving an individual's liberty or property interest.[130] Although courts have difficulty with the threshold question of state action in some instances,[131] self-regulatory organizations are clearly so acting.[132] Assuming that one of the

---

requirements in the first place. *See* Abramson, *supra* note 119, at 199-208. In addition, the expansion of procedural rights in reviewing administrative discretion has come to a pronounced halt. Further "judicial innovations" would "respond more to the symptoms of the problem than its underlying roots. ... . Moreover, the current and likely future federal judiciary has little enthusiasm for it." Stewart, *supra* note 58, at 348-49.

[126] See, *e.g.*, Davis' argument for a reconstituted nondelegation doctrine focused on protecting against uncontrolled discretionary power, which he admits would be a "sweeping" change. DAVIS, *supra* note 14, at 206-07.

[127] *See* Stewart, *supra* note 58, at 347. Recommendations of the Administrative Conference of the United States have generally endorsed the rulemaking requirements under the Administrative Procedure Act with slight modifications. *See* Public Participation in Administrative Hearings, 1 CFR §305.71-6, Procedures for the Adoption of Rules of General Applicability, *id.* §305.72-5, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, *id.* §305.76-3, and Interpretive Rules and Statements of General Policy, *id.* §305.76-5.

[128] This requirement applies equally to rulemaking and adjudication. *See* Decisional Officials' Participation in Rulemaking Proceedings, 1 CFR §305.80-4 (rulemaking); Abramson, *supra* note 119, at 202, and *infra* note 129 and accompanying text (adjudication).

[129] *See, e.g.*, Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1132 (adherence to precedent, if any, established by general rules), 1145 (notice, opportunity for hearing, independent decisionmaker); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475 (1986) ("the participation of an independent adjudicator is ... an essential safeguard [regardless of context], and may be the only one").

[130] Others have suggested that due process is a common law requirement. *See* WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION 568-69 (2d ed. 11985); Courts Oulahan, *The Legal Implications of Evaluation and Accreditation*, 7 J. L. & EDUC. 193, 223 (1978).

[131] *See* Abramson, *supra* note 119, at 203 & n.219.

[132] *See id.* at 169 (characterizing programs such as audited self-regulation as "formal government deputizing of private persons") & 213 (concluding that "[s]ince, by definition, the private actor has been made a public actor, its action will constitute state action"). *See also* Intercontinental Indust., Inc. v. American Stock Exchange, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (due process required in stock exchange delisting proceeding); Villani v. New York Stock Exchange, 348 F. Supp. 1185, 1188 n.1 (S.D.N.Y. 1972), *aff'd sub nom.*, Sloan v. New York Stock Exchange, 489 F.2d 1 (2d Cir. 1973) (beyond question that due process rights apply to exchange disciplinary proceedings because the exchanges are exercising federal powers); Eleanor D. Kinney, *Suits by Disappointed Applicants: Due Process, etc.*, in PRIVATE ACCREDITATION IN THE REGULATORY STATE 2 (materials prepared for conference sponsored by Am. Bar Ass'n Sec. of Admin. L. & Pract., May 21, 1993) ("Given

protected interests is involved,[133] the issue once again is what process is due in each case. The Supreme Court has remained steadfast in its reliance on a balancing test[134] to determine what process is due, a test which has been criticized and is difficult to apply in the abstract.[135] The requirements in decided cases, however, are very similar to those applied under the nondelegation doctrine above: an unbiased decision maker,[136] notice and an opportunity to be heard, and a right to confront and cross-examine witnesses, for example.[137]

C. Liability of Self-Regulatory Organizations

An additional area of concern in designing a program of audited self-regulation is certainly the exposure to liability which the self-regulatory organizations or individual actors might have. The major sources of any such liability are the antitrust laws and tort law. Although the background issues are discussed below, it is impossible to state in the abstract the "proper" extent of exposure in these areas, since that decision involves policy judgments and the position of the actors in each industry which admit of no "right" answer. For example, although the regulators would likely desire that their liability be severely limited if not eliminated altogether, sound reasons can be given for permitting broad liability under antitrust[138] and tort law.[139]

---

that the decisions of private accreditors in these disputes pertain directly to certification for participation in government-sponsored health insurance programs, the determination of whether state action exists should be straightforward ... .").

[133] It is likely that a program of audited self-regulation will affect liberty or property interests, as with the brokers and listed companies in *Villani* and *Intercontinental Industries, supra. But see* O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 786-88 (1980) (decision by government to strip nursing home of accreditation and thus eligibility to participate in Medicaid does not involve residents' Fifth Amendment interests). It is difficult to state in the abstract what interests will qualify for protection. *See* Abramson, *supra* note 119, at 214 n.286.

[134] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[135] *See* Abramson, *supra* note 119, at 201-02.

[136] *See Villani, supra,* at 1190-91; Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161 (D.N.J. 1976), *appeal dismissed,* 430 U.S. 951 (1977) (holding that due process, applicable in this case because of "state action" subject to the Fourteenth Amendment, requires an impartial tribunal, and that a board composed of plaintiff's competitors could nonetheless be impartial provided they have no immediate pecuniary interest).

[137] *See Intercontinental Industries, supra,* at 941-43. *See generally,* Oulahan, *supra* note 130, at 225-26 (concluding that due process in educational accreditation "would seem to require, at the minimum," published criteria for measurement, published procedures for review or appeal of an adverse decision, opportunity for a hearing with representation, and a decision on the record showing the basis of the decision).

[138] *See, e.g.,* Silver v. NYSE, 373 U.S. 341, 359-60 (1963) ("the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable").

[139] *See* Peter H. Schuck, *Liability to Those Injured by Negligent Accrediting Decisions,* in PRIVATE ACCREDITATION AND THE REGULATORY STATE 4 (materials prepared for conference sponsored

1. Antitrust Liability

Self-regulation involves by its very nature collusive conduct in restraint of competition, the activity at the very heart of the antitrust laws.[140] It is virtually impossible to obtain an explicit statutory exemption from the antitrust laws.[141] Nor would such an exemption necessarily be wise policy, since antitrust proscriptions have been recognized as beneficial even when operating within a significant regulatory program.[142]

It is difficult to predict the impact of antitrust litigation even in a particular program, much less extend any concepts generally to systems of audited self-regulation, since liability likely does not turn on the structure of the program from the outset, but rather the particular impact on the antitrust plaintiff in a given case. Nonetheless, the process protections discussed in Part III.B above are also relevant to antitrust analysis in two respects: they may permit a court to imply an exemption from the antitrust laws; and they may help define the boundaries between permissible conduct and illegal conspiracies.

An antitrust exemption will be implied only where necessary for the underlying regulatory scheme to work, and only if the agency has made the antitrust inquiry of whether the restraints on competition are reasonable and the least restrictive means toward the regulatory end.[143] Thus, the agency must have the benefit of a fully developed record in order to make an antitrust inquiry adequate for the reviewing court.[144] Process protections are vital in developing such a record. The same considerations would hold true for the deliberations of the self-regulatory organization. Initially, rules for antitrust immunity in the context of audited self-regulation arose primarily from cases in the securities

---

by Am. Bar Ass'n Sec. of Admin. L. & Prac., May 21, 1993) ("If the tort system is to ensure that the social costs of poor accreditation decisions are internalized and borne by those who can best minimize them, it will have to provide an effective cause of action against accreditors.").

[140] *See* 7 PHILLIP AREEDA, ANTITRUST LAW ¶1477 at 343 (1986) ("[T]rade associations are routinely treated as continuing conspiracies of their members"). *But see* Consol. Metal Products, Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988) ("[A] trade association is not by its nature a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade."). Whether a conspiracy is found may depend in part on the existence of process protections; *see infra* notes 154-157 and accompanying text.

[141] Such an attempt was rejected by a Congressional committee in SECURITIES INDUSTRY STUDY, *supra* note 49, at 155-64. There are some exceptions, however; *see* 7 USC §608b(a) (exemption from the antitrust laws for agricultural marketing agreements), discussed *infra* Part IV.D.1, and the general grants of immunity to peer reviewers and peer review organizations, *infra* note 168 and accompanying text.

[142] *See* SECURITIES INDUSTRY STUDY, *supra* note 49, at 164, and *supra* note 138 and accompanying text.

[143] *See generally* 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 224e (1978).

[144] *Id.* at 152. Areeda and Turner focus on the need for deliberation at the agency level, but the same considerations hold true for deliberations of the self-regulatory organization. *See* Silver v. NYSE, 373 U.S. 341, 361-62 (1963).

industry.[145] In a dispute between the New York Stock Exchange and one of its members,[146] the Supreme Court found "unjustifiable" action by the NYSE because it proceeded without notice or hearing in its regulation.[147] Although failure to observe procedural fairness is no longer considered tantamount to an antitrust violation, [148] process requirements nonetheless likely remain relevant in determining whether an exemption should be implied.[149] In a later case, the Court cited the pervasive oversight by the Securities and Exchange Commission of rules of the NYSE in granting an exemption from antitrust liability for price-fixing, activity otherwise clearly illegal.[150] The Court relied upon the existence of oversight authority and the actual use of that authority in balancing competitive and regulatory concerns.[151] Although later cases have suggested it is unlikely that an exemption will be implied,[152] the decision is in any event very dependent on the particular facts of each case.[153]

---

[145] This is perhaps because the audited self-regulation in the securities industry is the most well-established and developed of any model. *See* Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. REV. 475, 476-78 (1984). Smythe notes that it is possible but unlikely that similar antitrust protection would be given to largely voluntary regulatory efforts. *Id.* at 514-15.

[146] Silver v. NYSE, 373 U.S. 341 (1963).

[147] *See id.* at 361-62.

[148] *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 291-93 (1985) (limiting *Silver* to its facts, where lack of procedural protections were relevant in not finding an implied exemption from the antitrust laws in the Securities Exchange Act, and holding that due process concerns generally do not affect analysis of conduct otherwise actionable under the antitrust laws). If there is no impact on competition, therefore, even arbitrary exclusion of a competitor may not be actionable under the doctrines set forth in *Northwest. See, e.g.*, Moore v. Boating Industry Ass'n, 819 F.2d 693, 710-13 (7th Cir. 1987), Goss v. Memorial Hospital System, 789 F.2d 353, 354-55 (5th Cir. 1986). *See generally*, Robert Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott,"* 39 VAND. L. REV. 1507 (1986).

[149] The repudiation of *Silver* in *Northwest* extended only to the suggestion that procedural protections could save otherwise actionable conduct. *See Northwest, supra*, 472 U.S. at 293. The Court in *Northwest* did not hold that due process protections were irrelevant for purposes of determining whether a regulatory program effected an implied repeal of the antitrust laws, which was the issue before the Court in *Silver*.

[150] *See* Gordon v. NYSE, 422 U.S. 659 (1975). *See also* Austin Municipal Securities, Inc. v. NASD, 757 F.2d 676, 694-95 (5th Cir. 1985) (implied immunity from antitrust liability for investigation by NASD of its members); Harding v. American Stock Exchange, 527 F.2d 1366, 1370 (5th Cir. 1976) (implied immunity for delisting of a company's stock from trading on a stock exchange).

[151] *See* Smythe, *supra* note 145, at 507, *Austin Municipal Securities, supra*, at 695.

[152] *See* 1 PHILLIP AREEDA & DONALD F. TURNER, *supra* note 143, at ¶ 223.2 (Supp. 1993) (reviewing recent cases, all of which failed to find an implied immunity).

[153] *See id.* at 135-36 ("Regulatory regimes also vary widely in the comprehensiveness of their powers over the firms they regulate and in the degree to which ordinary competitive forces are left to operate. Thus, the room left for the continued operation of normal antitrust rules will differ greatly among regulated industries. Such variations mean that the antitrust result will depend on the particular language and structure of each regulatory statute.").

Process protections are also relevant in determining whether there is conduct actionable under the antitrust laws. Disregard or manipulation of process has been held to be actionable anticompetitive conduct,[154] while a showing of compliance with that process can remove the unfairness or impropriety that is an essential element of an actionable conspiracy.[155] Process is all the more important in a program of audited self-regulation, since by definition, there is conduct in restraint of trade;[156] the only protection may be a fair process which prevents a court from finding any conspiracy. Even in the case of unregulated trade associations, extensive procedural protections have been recommended.[157] Those should be extended to audited self-regulation, which has all the more anticompetitive potential.

Thus, there appear to be three separate sources of process requirements in a system of audited self-regulation: the nondelegation doctrine, the due process clause, and antitrust law. The nondelegation doctrine focuses upon the control of discretion; the due process clause focuses on protection of the property interest of the regulated entities, and the antitrust laws focus on the protection of the competitive process. Despite these distinct purposes, there is clearly some overlap among each of these sets of standards. Establishing minimum procedural standards not only further compliance with the nondelegation doctrine,[158] but will likely assure more widespread acceptance by the industry and the public.[159] And the requirement of plenary agency authority over the self-regulator and the regulated entities themselves not only insulates self-regulation from nondelegation and antitrust attacks, but provides more complete assurance, through agency supervision, of the efficacy of and legitimacy of the self-regulation itself.[160]

---

[154] *See* Am. Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 570-71 (1982); Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 946-47 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988). There must, of course, be separate evidence of an economic impact. *See supra* note 148.

[155] *See* Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 488-89 (1st Cir. 1988).

[156] *See supra* text accompanying note 10 (regulation is defined as alteration of behavior "backed by the use of penalties"). In most cases, even unregulated trade associations are engaging in "continuing conspiracies," *see* 7 PHILLIP AREEDA, *supra* note 140, at 343-46. Thus, voluntary associations which only certify products or services are not in violation of the antitrust law where fair practices or procedures are followed, since there is no actionable conduct. *See* Wilk v. Am. Medical Ass'n, 895 F.2d 352, 374 (7th Cir. 1990); *Consol. Metal Products, supra*, 846 F.2d at 292.

[157] *See* Administrative Conference of the United States, Federal Agency Interaction with Private Standard-setting Organizations in Health and Safety Regulation, 1 CFR §305.78-4. Paragraph 6(c) of that Recommendation states that the standard-setting association should assure that: (1) membership includes all affected groups; (2) notice of action is given to interested parties; (3) interested parties have an opportunity to participate; (4) careful consideration is given to minority views and objections; (5) supermajority approval is required for a standard to be effective; (6) there is an adequate opportunity for review; (7) there is a record maintained sufficient to document compliance with process requirements; and (8) the entire process is open to public scrutiny and review.

[158] *See* Smythe, *supra* note 145, at 509 n.164 ("delegation to the private sector, if done on the securities industry model, would ... avoid the constitutional [nondelegation] problems.").

[159] *See* BARAM, *supra* note 19, at 60.

2. Tort Liability

Audited self-regulation involves private organizations regulating the conduct of others. Any such limitations on conduct necessarily bring the possibility of claims for damages. No matter how good the procedure, a regulated entity might attack the decision of the self-regulatory organization on the merits.

Lawsuits against self-regulatory organizations fall generally into two categories. First, the regulated entity may directly challenge the particular action: a hospital whose accreditation is stripped, making it no longer eligible for Medicare reimbursement, or a securities broker censured, fined or expelled by the stock exchange. Second, injured third parties may sue for damages: patients whose Medicare coverage was terminated, investors who were defrauded by a poorly regulated market or an unscrupulous broker, or students at a college whose accreditation was not renewed, thus eliminating any possibility for federally-guaranteed student loans.[161]

The first type of action, direct attack on the self-regulator, may be foreclosed by a decision to grant immunity, ordinarily reserved for members of the government,[162] to self-regulatory organizations which exercise quasi-governmental functions, notably prosecution or enforcement.[163] And since governing statutes or regulations provide for agency and ultimately judicial review of the organization's decision, a disappointed regulated entity will ultimately have a cause of action for the relief sought.[164]

---

[160] *See* Jennings, *supra* note 48, at 679-90 (positing that "any ... public institution to which has been 'delegated governmental power' should be subject to greater governmental oversight in several respects," and presaging several reforms, such as agency review of membership denials and disciplinary actions, review of self-regulatory organization rules and independent authority to make and enforce self-regulatory organization rules, which came to pass in amendments to the securities laws in 1975); Smythe, *supra* note 145, at 509 & n.164 (the framework adopted by the 1975 amendments will provide maximum protection from antitrust immunity, nondelegation attacks while avoiding "an increasingly cumbersome and insensitive federal bureaucracy").

[161] There are, of course, other actions as varied as tort law, not relevant to this study. For example, the same underlying facts as discussed in the hypotheticals in the text might support actions for defamation, fraud or abuse of process. However, these actions require some greater intent on the part of the defendant, and are thus distinguishable from actions sounding in negligence which are the main concern of self-regulators. *See generally*, JOHN D. BLUM ET AL., PSROS AND THE LAW 183-191 (1977). In addition, there are occasional claims for damages caused by self-regulators, but unrelated to the merits of the regulation. *See, e.g.*, Dilk, *supra* note 29, at 593 (discussing Lavitt v. United States, 177 F.2d 627 (2d Cir. 1949), an action "to recover damages ... for the burning of a potato warehouse through the alleged negligence of three potato inspectors"); KAPLIN, *supra* note 130, at 570-71 (discussing Avins v. White, 627 F.2d 637 (3d Cir. 1980), an action alleging defamation of a law school faculty member by an American Bar Association consultant during an accreditation inspection).

[162] *See generally* Butz v. Economou, 438 U.S. 478 (1978) (immunity granted to Secretary of Agriculture in initiating administrative action against commodities dealer); Nixon v. Fitzgerald, 457 U.S. 731, 744-48 (1982) (discussing background and development of governmental immunity doctrine).

[163] *See* Kwoun v. Southeast Mo. Prof. Stds. Rev. Org., 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988) (immunity from damages caused by action of peer review organization resulting in

The second type of action by third parties, one for damages, is more troublesome. Cases involving such allegations generally are resolved in favor of the self-regulatory organization, however, by imposing a high standard of actionable misfeasance,[165] higher standards for reliance and causation,[166] or simply refusing to extend the accreditor's duty to third parties at all.[167] In some instances there are explicit statutory grants of immunity.[168] However, these statutes are rare, and courts in other areas have been willing to expand duties of those who provide information about a provider of services to the third party consumers of those services.[169]

The extent of private liability is not necessarily relevant in designing a program of self-regulation, unless it is essential to the program that any such liability be eliminated entirely. Otherwise, there are other factors more important to the development of tort law generally and decided only on a case-by-case basis which should determine the outcome of those cases. However, as with antitrust liability, adherence to pristine procedure may nonetheless be advantageous. It

---

exclusion of physician from participation in Medicare and Medicaid reimbursement programs); Austin Municipal Securities v. NASD, 757 F.2d 676 (5th Cir. 1985) (immunity from damages caused by institution of disciplinary proceedings by NASD against member).

[164] Indeed, access to the courts on direct review has been relied upon by courts in several cases finding immunity from liability, assured that there remain safeguards against arbitrary conduct. *See Butz,* 438 U.S. at 515-16, *Kwoun,* 811 F.2d at 408, *Austin Municipal Securities,* 757 F.2d at 690.

[165] *See* 7 USC §25(b)(4) (requiring that plaintiff in action for damages based on violation of provisions of Commodity Exchange Act must establish that the defendant "acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss"). This language, added in 1982, codified the previously-understood standard implied under the Act. Bosco v. Serhant, 836 F.2d 271, 276 (7th Cir. 1987). *See also* Hochfelder v. Midwest Stock Exchange, 503 F.2d 364, 367-68 (7th Cir.), *cert. denied,* 419 U.S. 875 (1974) (stock exchange not liable for failure to enforce its own rules regarding actions of president of member firm unless it knows or has reason to know of the individual's misfeasance, or there are acts or events which would put the exchange on notice of possible violations); Spicer v. Chicago Board Options Exchange, 1990 WL 172712 at 16-17 (N.D. Ill. Oct. 30, 1990) (holding that stock exchanges and their members not liable to investors in market in aftermath of "Black Monday" 1987 for "negligence or simple errors of judgment"). *But see* Evans v. Kerbs & Co., 411 F. Supp. 616, 625 (S.D.N.Y. 1976) (referring to *Hochfelder* as "essentially a negligence standard").

[166] *See* Schuck, *supra* note 139, at 4-5.

[167] *See id.* at 6-8.

[168] *See* 42 USC §1320c-6(b) (immunity for peer review organizations); *id.* §11111(a)(1) (immunity for peer review generally). Agricultural marketing orders, *see infra* Part IV.D.1, provide in each instance for limited liability of the citizens serving on each marketing committee. *See, e.g.,* 7 CFR §905.88 ("No member or alternate of the committee nor any employee or agent thereof, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any handler or to any other person for errors in judgment, mistakes, or other acts, either of commission or omission ... except for acts of dishonesty.").

[169] *See* Schuck, *supra* note 139, at 13-20.

will not, of course, prevent liability for otherwise actionable conduct. But if proper standards of care are in fact followed, documentation of the rules and procedures followed will greatly assist scrupulous self-regulators in their own defense.[170]

IV. Survey of Current Uses of Audited Self-Regulation

This Part surveys existing programs[171] in several widely different regulatory areas. Each program possesses most or all of the required attributes of audited self-regulation as defined in Part I. In each instance, the program is measured against the requirements for effective implementation discussed in Part III, and the benefits of the program are compared with the benefits predicted in Part II.

A. Financial Institutions, Services and Products

Federal regulation of financial institutions is extensive. Each of the areas where audited self-regulation is used or has been considered are discussed below.

1. Securities Exchanges and Market Participants

The long-established model of supervised self-regulation is the regulation of the nation's securities exchanges and broker-dealers by the Securities and Exchange Commission (SEC) in conjunction with the exchanges and the National Association of Securities Dealers (NASD). Collectively, the exchanges and the NASD are referred to in the statute as self-regulatory organizations (SROs).[172]

Although the regulation of securities exchanges and broker-dealers is relatively uniform today, each has a separate origin.[173] The nation's securities exchanges were first federally regulated by the Securities Exchange Act of 1934.[174] Before 1934, the exchanges had on their own imposed a significant degree of regulation on their members.[175] In drafting regulatory legislation, "Congress assumed that its task included incorporating the existing self-regulatory institutions (*i.e.* the stock exchanges) into the new regulatory system."[176] Direct government regulation was discussed,[177] but rejected as impractical.[178]

---

[170] BLUM ET AL., *supra* note 161, at 185-86.

[171] The discussion below of the Institute for Nuclear Power Operations, *infra* Part IV.C, does not technically describe an existing program of self-regulation, since the Nuclear Regulatory Commission was prohibited by statute from using the rules of the self-regulatory organization in lieu of its own rules. *See infra* notes 423-425 and accompanying text. Nonetheless, this example is included in the study because it is similar to other programs of formal reliance on self-regulation, and it continues to be an example of informal reliance on self-regulation.

[172] *See* Securities Exchange Act §3(a)(26), 15 USC §78c(a)(26).

[173] The history of the development of regulation of the securities markets has been widely researched. The following discussion is only a brief summary of much fuller treatments elsewhere. For a listing of major works, see 6 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2788 n.3 (3d ed. 1990), and that work itself should also be included, *see id.* at 2787-2816.

[174] Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 USC §§78a-78kk).

The original regulation of securities exchanges was modest by current standards. Each exchange was required to register with the SEC, agree to comply with the Act and enforce compliance by its members and adopt rules governing their members including rules requiring discipline for conduct "inconsistent with just and equitable principles of trade."[179] The SEC was given authority to suspend or revoke an exchange's registration and to adopt rules for the exchanges in certain areas.[180]

The securities brokers and dealers themselves were subject to regulation by the exchange if they were at exchange member firms, subject to the above requirements of the Act. However, a significant amount of other trading took place outside the exchanges, or "over the counter," by brokers and dealers who were not exchange members. Regulation of this group proceeded on a parallel track. Because little was known about this market, Congress originally provided in 1934 general rulemaking authority for the SEC over brokers and dealers who were not exchange members.[181] In exercising that authority, the SEC required the registration of these firms, and in 1936 Congress amended the Act to require registration of all broker-dealers who effected transactions outside a registered exchange.[182]

---

[175] *See* Jennings, *supra* note 48, at 667-69; Smythe, *supra* note 145, at 480-81; Miller, *supra* note 83, at 869.

[176] Smythe, *supra* note 145, at 481.

[177] *See* SECURITIES AND EXCHANGE COMMISSION, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 4, at 501 (1963) [hereinafter SPECIAL STUDY]. In a later study, a Congressional committee concluded that "[e]vents preceding [the Securities Exchange Act] caused public regard for the exchanges to be so low that it would have been politically feasible to have made even greater changes than those made by that Act." SECURITIES INDUSTRY STUDY, *supra* note 49, at 80.

[178] "Self-regulation was originally advanced and adopted as a feature of Federal control on the ground of practicality. Initially, attention was focused on the exchanges ... and it was thought that the extent of the control necessary, either actually or potentially, made direct governmental intervention ineffective, if not impossible." SPECIAL STUDY, *supra* note 177, at 501.

[179] Securities Exchange Act of 1934, Pub. L. No. 73-291, §6(b), 48 Stat. 881, 886 (1934) (codified as amended at 15 USC §78f(b)(5)).

[180] *See generally* Jennings, *supra* note 48, at 670-71 (summarizing new requirements in 1934). The power to suspend or revoke a registration was regarded, even at its origin, as severe, and it has been rarely used. *Id.* at 671; Smythe, *supra* note 145, at 483; Douglas C. Michael, *The Untenable Status of Corporate Governance Listing Standards*, 47 BUS. LAW. 1461, 1502 n.242 (1992).

[181] *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, §15, 48 Stat. 881, 895-96 (1934). "The brevity and generality of this treatment arose from a realistic recognition of the great difficulties of working out in any detail a suitable plan of regulation at that time, in view of the fact that so little was then known concerning these markets." S. REP. NO. 1455, 75th Cong., 3d Sess., at 4 (1938).

Regulation of broker-dealers outside of the securities exchanges suffered from the lack of any preexisting organization comparable to the exchanges on which to build a self-regulatory system. The Investment Bankers Conference Committee, largely created at the SEC's behest, was organized for that task.[183] New legislation was considered necessary to properly constitute that committee as a self-regulatory organization, with regulation patterned after the securities exchanges.[184] As with the exchanges,[185] direct government regulation was considered and rejected.[186]

Although the regulation of over-the-counter brokers was patterned on the regulation of the exchanges, it differed in at least two respects. First, Congress was confronted with organizing the SRO from the outset, rather than taking the exchanges with a long history of voluntary regulation, and was thus able and willing to improve on the exchange model.[187] Second, "[w]hereas the stock exchanges ... resisted governmental oversight, the [over-the-counter dealer SRO was] an outgrowth of a desire by responsible representatives of the ... business for some form of industry self-regulation."[188]

The resulting legislation, known as the Maloney Act,[189] provided for registration with the SEC of "national securities associations" similar to the securities exchanges, but governing nonmember broker-dealers and trading of securities not listed on the exchanges. In addition to the powers granted the SEC over the exchanges, there was added the ability of the SEC to review disciplinary proceedings and to propose rule changes, which were considered significant additions.[190] The SEC informally approved the idea of a strong national securities association,[191] and the NASD was registered as the first national securities association shortly after passage of the Maloney Act. It remains the only such organization today.[192]

---

[182] *See* Pub. L. No. 74-621, §3, 49 Stat. 1375, 1377 (1936). *See generally* DAVID A. LIPTON, BROKER-DEALER REGULATION §1.01, at 1-3 to 1-7 (1988). Because most broker-dealer firms which were stock exchange members also effected transactions over-the-counter, this resulted in registration of virtually all broker-dealers (except specialists and floor brokers, who did their trading only on the floor of the exchange) with the SEC. *See id.* §1.01, at 1-6.

[183] *See* SPECIAL STUDY, *supra* note 177, at 604-05. The Committee originated as the Investment Bankers Code Committee, one of several "industry code" groups formed under the National Industrial Recovery Act. Even when that Act was declared unconstitutional in 1935, *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the code committee continued its activities and reorganized itself, all with the SEC's encouragement. SPECIAL STUDY, *supra*, at 605; *accord* Smythe, *supra* note 145, at 484.

[184] *See* Hed-Hoffman, *supra* note 48, at 205 & n.81.

[185] *See supra* note 177 and accompanying text.

[186] *See* Howard C. Westwood & Edward G. Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROBS. 518, 526 (1952); SECURITIES INDUSTRY STUDY, *supra* note 49, at 82-83.

[187] In the wake of the failure of the National Industrial Recovery Act, moreover, the SEC recognized that government regulation must be more comprehensive (to be legally sufficient) as well as less intrusive (to be politically realistic). At the same time, a major scandal at the New York Stock Exchange provided the impetus to distinguish the new SRO from the NYSE, then held in low esteem. *See* Hed-Hofmann, *supra* note 48, at 205 & n.82.

[188] Jennings, *supra* note 48, at 675.

[189] Pub. L. No. 75-719, 52 Stat. 1070 (1938).

Thus established on parallel tracks, self-regulation by the securities exchanges and the NASD ran until they were joined in 1975. The change was precipitated by the "paperwork crisis" of 1968-70, when a marked increase in trading volume overwhelmed the antiquated trade-settlement mechanisms in the industry, forcing trading to be curtailed and many securities firms into insolvency.[193] Congress responded initially with the Securities Investor Protection Act of 1970,[194] to safeguard investors from losses due to their brokers' financial difficulties,[195] and then with a comprehensive reform of the self-regulation of the securities industry. In the Securities Acts Amendments of 1975,[196] the self-regulation and SEC oversight was unified and strengthened. Reversing the process of the 1934-38 era, Congress used the pattern of SEC supervision of the NASD as the model, now imposing the stricter provisions of that law on the securities exchanges as well, collectively referring to them in the statute as "self-regulatory organizations" (SROs).[197] In addition, the Act expanded the supervision of the SROs' self-regulation.[198] It provided for complete review and approval by the SEC over the SROs' rulemaking,[199] allowed the SEC to proceed administratively against a substandard SRO,[200] and gave the SEC independent authority to enforce SRO rules in court.[201]

---

[190] *See* Jennings, *supra* note 48, at 675-76; SPECIAL STUDY, *supra* note 177, at 705-06. These changes were referred to as a substantial advance over the pattern of self-regulation applicable to the stock exchanges," Jennings, *supra*, at 677, and as "[t]he existing allocation of regulatory responsibility between the exchanges and the Commission ..., but 'with 1938 improvements.'" SPECIAL STUDY, *supra*, at 606.

[191] *See* SPECIAL STUDY, *supra* note 177, at 606. *But see* Hed-Hoffman, *supra* note 48, at 206 ("One of the unexpected results of the Maloney Act was the emergence of only one organization of broker dealers instead of many."); Westwood & Howard, *supra* note 186, at 526.

[192] *See* SECURITIES INDUSTRY STUDY, *supra* note 49, at 82; Lipton, *supra* note 12, at 528 n.1; Smythe, *supra* note 145, at 478.

[193] For descriptions of the crisis, see SECURITIES INDUSTRY STUDY, *supra* note 49, at 3-13; H.R. REP. NO. 123, 94th Cong., 1st Sess. 44-45 (1975); SECURITIES AND EXCHANGE COMMISSION, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS, H.R. DOC. NO. 231, 92d Cong., 2d Sess. (1971); 6 LOSS & SELIGMAN, *supra* note 173, at 2897-907.

[194] Pub. L. No. 91-598, 84 Stat. 1636 (1970) (codified at 15 USC §§78aaa-78*lll*).

[195] *See* H.R. REP. NO. 123, 94th Cong., 1st Sess. 45 (1975).

[196] Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified in scattered sections of 15 USC).

[197] *See* H.R. REP. NO. 123, 94th Cong., 1st Sess. 48-49 (1975); S. REP. NO. 75, 94th Cong., 1st Sess. 26-28 (1975); *accord* SECURITIES INDUSTRY STUDY, *supra* note 49, at 112.

[198] *See generally*, S. REP. NO. 75, 94th Cong., 1st Sess. 26-36 (1975).

[199] *See* Securities Exchange Act §19(b)-(c), 15 USC §78s(b)-(c).

[200] *See id.* §19(g)-(h), 78 USC §78s(g)-(h).

[201] *See id.* §21(d)(1), (e)-(f), 15 USC §78u(d)(1), (e)-(f).

Finally, in 1983, Congress closed the remaining gap in self-regulation. Since 1964, all broker-dealers not members of the NASD or an exchange had been subjected to similar self-regulatory rules imposed directly by the SEC.[202] Congress found that the more flexible sanctions available through the NASD were preferable to the limitations on direct SEC action, confirming "the desirability of self-regulation" heralded in the 1975 amendments.[203] Direct SEC regulation was eliminated, and all broker-dealers are now required to be members of either an exchange or the NASD.[204]

This system of supervised self-regulation, continuously modified over the 60 years since its inception, is certainly the longest and most comprehensive federal government experience with audited self-regulation. At each point of major reform, the fundamental soundness of the system has been reaffirmed.[205] Although its origin may have been in part due to the "historical accident" of a preexisting self-regulatory structure in the case of the securities exchanges,[206] it has been built up far beyond this original structure. As it stands today, the system of audited self-regulation contains the attributes identified in Part III above as necessary for effective self-regulation.

Has the audited self-regulation of securities exchanges and broker-dealers produced the benefits which analysts project from such a system? As measured against the theories in Part II, the results are encouraging. There are assertions that the securities industry self-regulation does not result in better rules,[207] more precise and efficient enforcement,[208] congruence with members' preexisting self-interest,[209] nor lower overall costs of regulation.[210] However, in retrospect, most of the reformers call not for scrapping the system, but for recognizing the full power of the agency as a supervisor of self-regulation;[211] and at each point of reform discussed above, the agency's powers were in fact broadened. It appears that the ability and willingness of the SEC to perform its "audit" tasks vigilantly remains the key to success.

---

[202] This was known as the "SEC Only" or "SECO" program, since these broker-dealers were subject to regulation by the SEC directly and not through any SRO. *See* LOSS & SELIGMAN, *supra* note 173, at 2815.

[203] H.R. REP. NO. 106, 98th Cong., 2d Sess., at 6 (1983). The legislation affected few broker-dealers and generated a small cost savings to the SEC. *See supra* note 51.

[204] *See* Securities Exchange Act §15(b)(8), 15 USC §78*o*(b)(8).

[205] *See, e.g.*, H.R. REP. NO. 123, 94th Cong., 1st Sess. 48-49 (1975); SECURITIES INDUSTRY STUDY, *supra* note 49, at ix; SPECIAL STUDY, *supra* note 177, at 504.

[206] *See* Smythe, *supra* note 145, at 478.

[207] Commentators have questioned the assumed expertise of the self-regulators, *see* Miller, *supra* note 183, at 862, as well as their ability to write better rules in "ethical" areas. *See* Hed-Hoffman, *supra* note 48, at 209-10; *but see* Jennings, *supra* note 48, at 678 (concluding that in this area "the Commission, the Congress, and the industry seem justified in supporting the extension and refinement of the self-regulatory philosophy").

[208] The enforcement has been criticized as too dilatory, *see* Hed-Hofmann, *supra* note 48, at 210-12, and as too swift and unfair, *see* Miller, *supra* note 83, at 865-67.

[209] *See* Hed-Hofmann, *supra* note 48, at 206-08; Miller, *supra* note 83, at 867-68.

[210] *See* Hed-Hofmann, *supra* note 48, at 212; Miller, *supra* note 83, at 864-65; Jennings, *supra* note 48, at 677.

2. Commodity Exchanges and Market Participants

The Commodity Exchange Act[212] provides for comprehensive regulation of the nation's futures[213] markets under the supervision of the Commodity Futures Trading Commission (CFTC). The history of this regulation provides one of the best studies of the progress of audited self-regulation from its earliest origins, in regulation of commodity exchange products and trading practices, to one of its most modern applications, in regulation of the participants in those markets.

Futures markets were first federally regulated in the Grain Futures Act of 1922,[214] which provided primarily for registration of commodity exchanges with the Department of Agriculture and prohibited futures trading outside these registered exchanges. The original purpose of the regulation was to prevent manipulation by forcing all trading onto a registered exchange and requiring those exchanges to police and prevent manipulation.[215] Exchanges were required only to file required reports with the government and to prevent the dissemination by their members of false or misleading information and manipulation of prices.[216] Although the new authority was used by the Department of Agriculture to conduct numerous investigations into abnormal trading, "its role was one of investigation and .. actual regulation was conducted by the exchanges."[217]

---

[211] *See* Miller, *supra* note 83, at 885-87; Hed-Hofmann, *supra* note 48, at 217; Jennings, *supra* note 48, at 690.

[212] Commodity Exchange Act, ch. 369, 42 Stat. 998 (1922) (codified as amended at 7 USC §§1-23).

[213] "Futures" is a shorthand reference for a variety of instruments. The original agreement which was the source of business for the nation's boards of trade was a futures contract, which is "a binding agreement to take delivery of or to deliver a known quantity of a commodity which is of a uniform quality at a price specified at the time the contract is made." Marshall J. Nachbar, *Contract Market Self-Regulation Under the Commodity Exchange Act*, 31 CLEV. ST. L. REV. 573, 574 n.2 (1982). The growing trade in primarily agricultural commodities required standardization of these contracts, which was the original impetus for the formation of the nation's commodity exchanges or boards of trade in the mid-19th century. *See* JERRY W. MARKHAM, THE HISTORY OF COMMODITY FUTURES TRADING AND ITS REGULATION 4-5 (1987). Since that time, these contracts have grown dramatically in scope, covering not only agricultural commodities but other physical products, financial instruments, foreign currency and market indexes. In addition, the type of contracts has grown in variety, including options on commodities and options on futures contracts. *See* Nachbar, *supra*, at 575-76 & n.4; MARKHAM, *supra*, at 179-249 (describing instruments traded).

[214] Grain Futures Act of 1922, ch. 369, 42 Stat. 998 (1922). The Act was given its current name in 1936; *see* Commodity Exchange Act, ch. 545, §1, 49 Stat. 1491 (1936) (codified at 7 USC §1).

[215] *See* MARKHAM, *supra* note 213, at 15 (noting that this act "forms the core of the current regulatory scheme).

[216] Grain Futures Act of 1922, ch. 369, §5, 42 Stat. 998, 1000 (1922) (codified at 7 USC §7).

The underlying rationale for relying on self-regulation of commodities markets fits with several of the hallmarks for successful self-regulation discussed in Part III. The exchanges were recognized as having an economic self-interest in assuring a minimum level of fair play in the trading on their markets.[218] In addition, the exchanges had demonstrated a level of expertise in what was recognized, even in the formative stages, as a complex and technical subject best understood by the participants.[219]

There followed for the next fifty years increasing dissatisfaction with the self-regulatory abilities of the commodity exchanges. In 1936, the Act was significantly amended to require federal registration of brokerage firms (known as futures commission merchants, or FCMs) and traders on the floor of the exchanges,[220] to prohibit by federal statute fraud and excessive speculation,[221] and to require the exchanges to enforce their own rules.[222] And again in 1968, federal authority was further extended to expand the types of prohibited conduct,[223] to give the Department of Agriculture administrative enforcement authority over any market participants,[224] authority to review exchange rules,[225] and to establish for the first time minimum financial requirements for FCMs.[226] Far from extending self-regulation, the 1968 amendments "reflected a deep animosity between the Agriculture Department and the industry it was regulating."[227]

---

[217] MARKHAM, *supra* note 213, at 18. The exchanges had a long though spotty history of discipline of their members. Though "abuses were rampant" at the exchanges, *id.* at 5, disciplinary actions brought by the exchanges against their members were uniformly upheld in the state courts. *See* Jonathan Lurie, *Commodities Exchanges as Self-Regulating Organizations in the Late 19th Century: Some Perimeters in the History of American Administrative Law*, 28 RUTGERS L. REV. 1107, 1130-38 (1975).

[218] "[T]he purpose of self-regulation is to protect the integrity of the marketplace. An exchange which does not assure the public customer of a fair deal will suffer a large number of dormant contracts." Nachbar, *supra* note 213, at 578.

[219] *See* Lurie, *supra* note 217, at 1137-38 (describing deference by state courts in 1800s to exchange decisions on design of contracts as well as disciplinary proceedings, based on the exchanges' expertise).

[220] *See* Commodity Exchange Act §§4d-4e, as added by the Commodity Exchange Act of 1936, ch. 545, §5, 49 Stat. 1491, 1494-95 (1936) (codified as amended at 7 USC §§6d-6e).

[221] *See* Commodity Exchange Act §§4a-4c, as added by the Commodity Exchange Act of 1936, ch. 545, §5, 49 Stat. 1491, 1492-94 (1936) (codified as amended at 7 USC §§6a-6c).

[222] *See* Commodity Exchange Act §5a, as added by the Commodity Exchange Act of 1936, ch. 545, §7, 49 Stat. 1491, 1497 (1936) (codified as amended at 7 USC §7a).

[223] *See* Commodity Exchange Act §4b, as amended by Pub. L. No. 90-258, §5, 82 Stat. 26, 27 (1968) (codified as amended at 7 USC §6b).

[224] *See* Commodity Exchange Act §6(c), as added by Pub. L. No. 90-258, §5, 82 Stat. 26, 31 (1968) (codified as amended at 7 USC §13b).

[225] *See* Commodity Exchange Act §8(a)(7), as added by Pub. L. No. 90-258, §5, 82 Stat. 26, 33 (1968) (codified as amended at 7 USC §12a(7)).

[226] *See* Commodity Exchange Act §8(a)(3)(I), as added by Pub. L. No. 90-258, §5, 82 Stat. 26, 32 (1968) (codified as amended at 7 USC §12a(3)(I)).

In 1974, additional authority was granted to the government, and administration of the Act was transferred from the Department of Agriculture to the new CFTC.[228] In addition to expanding government regulation, Congress for the first time since 1922 reexamined and reaffirmed the basic structure of audited self-regulation of the industry.[229] The new CFTC was given authority over the commodities exchanges similar to that previously given the SEC over securities markets.[230] In general, the CFTC was required to approve all exchange rules,[231] and authorized to require new exchange rules in certain areas,[232] and require the exchanges to enforce their own rules.[233]

The above regulatory structure includes most of the elements listed in Part III for effective audited self-regulation. However, the increasing resort to direct regulation of the commodities exchanges suggests a growing frustration over the years on the part of the government with the exchange's abilities. The resulting failure to obtain many of the benefits listed in Part II can be attributed to the lack of incentive to comply on the part of the commodities exchanges. One commentator has argued that the exchanges' monopoly on trading futures-type products has reduced their economic incentive to maintain fair markets, as evidenced by the recent undercover investigation of the exchanges by government agents.[234] When these exchanges were first regulated in 1922, no comparable authorities existed to regulate off-exchange trading, and it was simply prohibited.

---

[227] MARKHAM, *supra* note 213, at 52. Industry opposition to the legislation was strong; *see id.* at 54-55.

[228] *See* Commodity Exchange Act §2(a)(2)-(11), as added by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §101, 88 Stat. 1389, 1389-90 (1974) (codified as amended at 7 USC §4a).

[229] *See* MARKHAM, *supra* note 213, at 63. For a general summary of the provisions of the 1974 legislation, see *id.* at 65-72.

[230] The pattern of supervised self-regulation established in 1938 with the Maloney Act, dealing with the SEC-NASD relationship, was relied upon in the 1974 legislation. That pattern was itself extended the following year to SEC regulation of the securities exchanges. *See supra* Part IV.A.1.

[231] *See* Commodity Exchange Act §5a(12), as added by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §210, 88 Stat. 1389, 1401 (1974) (codified as amended at 7 USC §7a(12)).

[232] *See* Commodity Exchange Act §8a(7), as added by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §213, 88 Stat. 1389, 1404 (1974) (codified at 7 USC §12a(7)) (changes may be made in areas including but not limited to trading and execution requirements, financial responsibility rules, solicitations and recordkeeping).

[233] *See* Commodity Exchange Act §6b, as added by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §212(b), 88 Stat. 1389, 1403-04 (1974) (codified at 7 USC §13a). *See generally*, MARKHAM, *supra* note 213, at 68-70 (summary of new provisions relating to CFTC's authority over contract markets).

[234] *See* Jerry W. Markham, *The Commodity Exchange Monopoly — Reform Is Needed*, 48 WASH. & LEE L. REV. 977, 987-93 (1991).

But today that void has been filled by federal and state securities laws.[235] Thus, if off-exchange trading were allowed, it is argued, "competition could assure that exchanges remain innovative by creating new, more attractive futures contracts and that their marketplaces remain free of fraud and achieve maximum efficiency."[236] Although the economic self-interest underlying effective audited self-regulation may be waning in the regulation of commodities exchanges, it could thus likely be returned.

In contrast to this checkered history of audited self-regulation in the commodities markets, the relatively recent regulation of the participants in those markets makes extensive use of this regulatory technique. From the outset, Congress and the CFTC recognized the need for audited self-regulation in oversight of the entities directing trades on the commodity exchanges.

In the same 1974 legislation which reformed the regulation of commodities markets,[237] Congress authorized the CFTC to register a new type of self-regulatory organization, a "futures association" to regulate industry members.[238] The CFTC would have full oversight of a futures association, comparable to SEC oversight of the securities markets.[239] Such an association "would benefit the [CFTC] by reducing its regulatory burden while allowing it to focus resources on oversight and enforcement functions most appropriate to a Federal agency."[240] Although modeled after the creation of the NASD in 1938, this futures association was fundamentally different. Because there is no "over-the-counter" trading in commodity futures, unlike securities, there was no preexisting organization nor would there be an economic self-interest in regulation among its members.[241] Initial attempts to organize such an association were stymied until Congress in 1978 authorized the CFTC to make membership in such an organization mandatory,[242] and in 1982 authorized the CFTC to delegate to such an organization all of its registration responsibilities under the Act.[243] These provisions were added to dispel concerns about antitrust and nondelegation problems.[244] The first and only such organization, the National Futures Association (NFA), was registered by the CFTC in 1981 and has assumed responsibility for broad portions of the Act dealing with all registered industry members, including proficiency testing, audit and financial surveillance, sales practice rules, registration and arbitration.[245]

---

[235] *See id.* at 1002.

[236] *Id.* at 1003.

[237] *See supra* note 228 and accompanying text.

[238] *See* Commodity Exchange Act §17, as added by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §301, 88 Stat. 1389, 1406-07 (1974) (codified as amended at 7 USC §21).

[239] *Compare id. with* Securities Exchange Act §§15A & 19, 15 USC §§78*o* & 78s, discussed *supra* Part IV.A.1. One significant difference is the scope of oversight with regard to rules. The CFTC's authority under Commodity Exchange Act §17(k), 7 USC §21(k), is limited to certain subjects, in contrast with the SEC's authority under Securities Exchange Act §19(c), 15 USC §78s(c). *See* CFTC REPORT, *supra* note 51, at 147-49. At least one court, however, has indicated that the SEC's §19(c) powers might be restricted in areas not closely-related to its regulatory responsibilities. *See* Business Roundtable v. SEC, 905 F.2d 406, 414 (D.C. Cir. 1990) (stating in dictum that with respect to rules "which do not regulate members and are not related to the purposes of the [Exchange] Act, the [SEC]'s powers will be quite limited").

[240] CFTC REPORT, *supra* note 51, at 15.

[241] *See id.* at 16.

In the NFA, Congress and the CFTC have provided for a distinct type of self-regulation. It contains the elements of effective audited self-regulation listed in Part III. Interestingly, though, the NFA had no preexisting structure or purpose; its sole function was to take over administration of significant portions of the Act from the CFTC in order to save federal staff resources. The NFA appears to have fulfilled many of the advantages of a system of audited self-regulation discussed in Part II. The technique results in a substantial cost savings to the government, those costs being largely shifted to the regulated industry.[246] More importantly, however, the self-regulation results in many areas in programs which are more detailed, informal and complete than could be undertaken by the CFTC, even if it were fully funded to undertake those programs directly.[247] Thus, in a complement to the regulation of commodities exchanges, one of the oldest examples of audited self-regulation, Congress and the CFTC have created a novel entity, a private organization which "exists solely for the purpose of regulating and does not conduct any commercial function."[248] Although it was created not by the self-interest of its members but by government-mandated membership,[249] it nonetheless fulfills the functions and meets the goals generally recognized for audited self-regulation.

---

[242] *See* Commodity Exchange Act §17(m), as added by the Futures Trading Act of 1978, Pub. L. No. 95-405, §22(4), 92 Stat. 865, 876 (1978) (codified at 7 USC §21(m)).

[243] *See* Commodity Exchange Act §17(*o*), as added by the Futures Trading Act of 1982, Pub. L. No. 97-444, §233(5), 96 Stat. 2294, 2321-22 (1983) (codified at 7 USC §23(*o*).

[244] *See* CFTC REPORT, *supra* note 51, at 17. For a discussion of the nondelegation doctrine and the application of antitrust laws to self-regulatory organizations, see *supra* Part III.B.1.

[245] *See* CFTC REPORT, *supra* note 51, at 20-23.

[246] CFTC staff estimated that in 1983-85 the NFA's operations resulted in $3.5 million in direct savings and $16.2 million in avoided additional costs. CFTC REPORT, *supra* note 51, at 132.

[247] *See id.* at 61 & 73 (review of sales practices), 83 (avoidance of multiple registration compliance costs) & 99-100 (informal disciplinary actions).

[248] CFTC REPORT, *supra* note 51, at A-1.

[249] *See supra* note 242 and accompanying text.

3. Investment Advisers

Under the Investment Advisers Act of 1940,[250] the SEC is charged with the registration of investment advisers.[251] Among other requirements, registered advisers must keep books and records as required by SEC regulations.[252] All such records are subject to "reasonable ... examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors."[253]

In the early 1980s, the number of registered investment advisers began to increase dramatically,[254] so much so that by 1992 the SEC was able to inspect each adviser, on the average, only once each 25 to 30 years.[255] By the mid-1980s, the SEC was considering proposals to use a system of supervised self-regulation for inspection of investment advisers.

In 1986, the NASD began a voluntary experimental program of inspection of its own members conducting advisory activities. In a report issued in 1988, the SEC concluded that this program "demonstrated both the feasibility and ability of the NASD inspectors to conduct adviser examinations."[256] In 1989, the SEC submitted proposed legislation to Congress to authorize the registration with the SEC of investment adviser self-regulatory organizations to conduct adviser inspections subject to SEC oversight.[257] The legislation was patterned after the self-regulation of broker-dealers under the Exchange Act.[258] The new self-regulation was intended to provide more effective inspections, facilitate the development of fair and ethical business practices, and do so at private rather than public cost.[259] In addition, it was expected that the investment advisors, having "acquired an interest in regulation to establish their trustworthiness," would be willing to undertake the effort and expense of self-regulation.[260]

---

[250] Pub. L. No. 76-768, Tit. II, 54 Stat. 789, 847 (1940) (codified as amended at 15 USC §§80b-1 to 80b-21).

[251] Investment Advisers Act §203(a), 15 USC §80b-3(a).

[252] *See* Investment Advisers Act §204, 15 USC §80b-4. The implementing regulation is Investment Advisers Act Rule 204-2, 17 CFR §275.204-2.

[253] Investment Advisers Act §204, 15 USC §80b-4.

[254] From 1981 through 1991, the number of registered advisers more than tripled, and the amount of assets they had under management increased more than ten times. *See* H.R. REP. NO. 883, 102d Cong., 2d Sess. 16 (1992); S. REP. NO. 312, 102d Cong., 2d Sess. 4 (1992).

[255] *See* S. REP. NO. 312, 102d Cong., 2d Sess. 4 (1992). The SEC does inspect the 500 largest investment advisers every three years, however. *Id.*

[256] REPORT OF THE STAFF OF THE SECURITIES AND EXCHANGE COMMISSION TO THE SUBCOMM. ON TELECOMMUNICATIONS AND FINANCE OF THE HOUSE COMM. ON ENERGY & COMMERCE, 100th Cong., 2d Sess. (1988), *reprinted in* [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,220 at 89,010 (Feb. 1988).

[257] *See* H.R. REP. NO. 883, 102d Cong., 2d Sess. 16-17 (1992); S. REP. NO. 312, 102d Cong., 2d Sess. 4-5 (1992).

[258] *See* S. REP. NO. 312, 102d Cong., 2d Sess. at 4 (1992). The system of broker-dealer supervised self-regulation is described *supra* Part IV.A.1.

The proposed arrangement thus bore the main hallmarks of a program of successful audited self-regulation. There were several preexisting industry groups with demonstrated willingness and ability to undertake the regulatory program. The benefits expected were more efficient inspections, rules more tailored to the experiences of the regulated than government rules might be, as well as significant cost savings to the government. Prior to the 1980s, the investment adviser industry was not considered a candidate for self-regulation, though it had been proposed as early as 1963, because of the lack of a strong organization in a very diverse industry and the resulting lack of professional or economic motivation.[261] However, there was significant industry opposition to the proposed legislation, and it was not enacted.[262] Some industry members believed that the likely self-regulatory organization, the NASD, did not sufficiently understand the specialized nature of investment advice in contrast to the sales and distribution orientation of broker-dealers with which it was more familiar.[263] In addition, the industry believed that direct government regulation would in fact be less expensive, an assertion borne out by the SEC's own study.[264]

After the defeat of the 1989 legislative proposal, the SEC began considering direct government regulation funded by special registration fees assessed on the investment advisers subject to inspections.[265] Legislation to that effect was introduced and passed in both houses of Congress in 1992,[266] but the versions were never reconciled in conference. The House bill provided that the SEC, at its option, could designate one or more of the existing broker-dealers SROs — the exchanges and the NASD — to perform inspections on members not primarily engaged in the investment advisory business.[267] Otherwise, however, the option of supervised self-regulation was eliminated.

---

[259] *See* Letter from David S. Ruder, Chairman, Securities and Exchange Commission, to The Honorable Dan Quayle, President of the Senate, June 19, 1989, *reprinted in* [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,422, at 80,188.

[260] TAMAR FRANKEL, THE REGULATION OF MONEY MANAGERS 81 (Supp. 1992).

[261] *See* 1 TAMAR FRANKEL, THE REGULATION OF MONEY MANAGERS 38 (1978).

[262] *See* H.R. REP. NO. 883, 102d Cong., 2d Sess. at 17 (1992); S. REP. NO. 312, 102d Cong., 2d Sess. 5 (1992).

[263] *See SEC Oversight of Investment Advisers: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs,* 102d Cong., 2d Sess. at 129 (statement of SEC Chairman Richard Breeden).

[264] *See id.* at 129-30 & n.15 (statement of SEC Chairman Richard Breeden).

[265] This change of heart was due to the lack of support for the legislation, a change in membership in the SEC, as well as the possibility, existent in 1990 but not earlier, that investment adviser fees might be raised to fund the government's own direct regulation. *See SEC Reconsidering Adviser SRO*, 22 Sec. Reg. & L. Rep. (BNA) 1060 (Jul. 20, 1990) (statement of SEC Commissioner Mary Schapiro).

[266] *See* H.R. 5726, 102d Cong., 2d Sess. (1992); S. 2226, 102d Cong., 2d Sess. (1992). Similar legislation has been introduced in the current Congress; *see Markey Introduces Bills to Reform Gov't Securities Market, Advisers Act,* 25 Fed. Sec. L. Rep. (BNA) 120 (Jan. 29, 1993).

This experience of the SEC in investment adviser inspections indicates that self-regulation efforts will founder absent the support of a relatively unified industry. The SEC faced an industry motivated for reform but otherwise still bearing the fragmentation which made self-regulation unworkable prior to the 1980s.[268] Furthermore, the government demonstrated its ability to perform the function at a lower cost, with no additional expense to the taxpayer, since industry would fund the inspections through increased registration fees.[269] The option of direct government regulation thus remained realistic. There remains the potential that the SEC rules will not be as well-tailored to the industry as would SRO rules,[270] but the industry has to date demonstrated little confidence in its own organizations to outperform the government in this area.

4. Accountants

The activities of accountants in preparing, reviewing and opining on financial statements, have been the subject of two systems of audited self-regulation: one under the federal securities laws, proposed in 1987 and ultimately abandoned, and one adopted under 1991 banking reform legislation. Each is discussed separately below.

Various sections of the federal securities laws require that financial statements submitted to the SEC or to investors be "audited," that is, certified by an independent accountant.[271] In order to certify a financial statement, the independent accountant must ordinarily assure that the statement is prepared in accord with authoritative accounting rules known collectively as "generally accepted accounting principles" or GAAP.[272] The procedures followed by the accountant in preparing the certificate in turn are dictated by authoritative literature known collectively as "generally accepted auditing standards" or

---

[267] *See* H.R. 5726, 102d Cong., 2d Sess., §4 (1992).

[268] *See supra* notes 261-263 and accompanying text.

[269] *See, e.g.*, S. REP. NO. 312, 102d Cong., 2d Sess., at 6-7 (1992).

[270] The proposed legislation does not specify standards for SEC rules, so that the SEC "will have the flexibility to provide the greatest amount of investor protection within the available resources." *Id.* at 6.

[271] *See, e.g.*, Securities Act Schedule A, pars. 25-26, 15 USC §77aa(25)-(26) (balance sheet and income statement in registration statements for securities registered for offer and sale under the Act); Securities Exchange Act §12(b)(1)(J)-(K), 15 USC §78*l*(b)(1)(J)-(K) (balance sheets and income statements of issuers registering securities under the Act may be required by the SEC to be so certified); *Id.* §17(e)(1)(A), 15 USC §78q(e)(1)(A) (balance sheets and income statements of registered broker-dealers filed annually with the SEC must be so certified); Regulation S-X, Article 3, 17 CFR §210, art. 3 (general requirement that financial statements required under the securities laws "shall be audited unless otherwise indicated").

[272] *See* CODIFICATION OF STATEMENTS ON AUDITING STANDARDS, Statement on Auditing Standards No. 1, §150.02 (Am. Inst. of Certified Pub. Accountants 1972) (Standard of Reporting No. 1).

GAAS.[273] The SEC, long concerned with audit quality as a cornerstone of the integrity of financial disclosure under the securities laws,[274] proposed in 1987 that the accountants themselves be subject to "peer review" of their audit programs by another accountant.[275] That peer review, in turn, would be done under the auspices of a "peer review organization" or PRO, which would be required to be approved by the SEC.[276]

As with the establishment of regulation of over-the-counter brokers,[277] this system was proposed with one preexisting industry organization at hand. Most accountants are members of the American Institute of Certified Public Accountants (AICPA); accounting firms are members of the AICPA's Division for CPA Firms. Almost all publicly-held companies (those subject to SEC reporting requirements) are audited by firms which are members of that Division's SEC Practice Section (SECPS).[278] The SECPS had a mandatory preexisting program of peer review for its member firms. No firm was at that time required to join the SECPS, and membership in the AICPA is of course voluntary, though most accountants are members.[279]

This proposal by the SEC for mandatory peer review was not classic audited self-regulation, because a PRO under the SEC's proposal would have no direct enforcement authority. If a reviewed accounting firm received an unsatisfactory peer review, it would simply so report. The SEC would make the final determination whether that accountant's certificate met the requirements of the securities laws.[280] In addition, no accountant would be required to join any PRO; the SEC staff would supervise the peer review in that instance.[281]

---

[273] *See* CODIFICATION OF STATEMENTS ON AUDITING STANDARDS, Statement on Auditing Standards No. 58, §508.08 (Am. Inst. of Certified Pub. Accountants 1988). Compliance with GAAS is required under the terms of the accountant's state-issued license to practice. *See* REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 69 (1987). For a general review of audit procedures and standards, see HANDBOOK OF ACCOUNTING AND AUDITING 5-5 to 5-9 (Robert S. Kay & D. Gerald Searfoss 2d ed. 1989).

[274] *See Independent Accountants; Mandatory Peer Review*, Securities Act Release No. 6695, 52 Fed. Reg. 11,665, 11,668 (1987) [hereinafter *Peer Review Release*] ("As a result of improved audits, the Commission believes that the completeness and accuracy of financial disclosure is improved and the integrity of the financial reporting process is enhanced.").

[275] *See Peer Review Release*, *supra* note 274.

[276] *See Peer Review Release*, *supra* note 274, at 11,672-75.

[277] *See supra* note 183 and accompanying text.

[278] *See* HANDBOOK OF ACCOUNTING AND AUDITING, *supra* note 273, at 45-16 (SECPS member firms audit 89% of all publicly-traded companies accounting for 99% of the aggregate sales volume of these companies).

[279] *See* REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 69-70 (1987).

[280] *See Peer Review Release*, *supra* note 274, at 11,674.

[281] *See id.* at 11,675-76. This is similar to the "SECO" program for broker-dealers in effect from 1964 through 1983; *see supra* note 202.

Though not a complete model of audited self-regulation, the peer review proposal did meet several of the requirements for successful self-regulation. The detailed rules would be made by the self-regulating body, the PRO, which the SEC believed would have the ability to make more detailed, relevant and constructive rules and applications.[282] The SEC would retain the role of initially approving and supervising the PRO,[283] and would retain final independent enforcement authority.[284] Nonetheless, the proposal contained most of the requirements recognized by commentators as necessary for effective regulation of audit quality.[285] It would meet the need for regulation with the least intrusion and the least cost, compared to direct governmental regulation or creation of a new statutory SRO.[286]

The missing element, however, was industry support for *supervised* self-regulation. The accounting industry generally was supportive of peer review, but chafed at the suggestion that allegedly substandard audits should be subject to full review by a PRO and the SEC as well.[287] A compromise providing for limited access by the SEC staff to SECPS investigation of allegedly substandard audits was reached in 1985,[288] but the SEC in its 1987 proposal made clear that it should have unrestricted access to these records.[289] Instead, in 1990 the AICPA approved a rule requiring its member firms which audit companies subject to SEC reporting requirements to join the Association's SEC Practice Section, and be subject to peer reviews. This identical proposal had been voted down by the AICPA membership in 1986, before the SEC proposal was announced.[290] This action was expected to take most of the momentum away from the SEC proposal,[291] and last year the SEC announced withdrawal of the mandatory peer review proposal.[292]

A similar regulatory scheme for accountants performing audits of financial institutions succeeded in mandating and overseeing accountants' peer reviews where the SEC proposal failed. In the Federal Deposit Insurance Corporation Improvement Act of 1991,[293] Congress required annual and periodic reports from federally insured financial institutions, and required that those reports be examined by independent public accountants.[294] An accountant is required to perform an annual audit of the institution's financial statements,[295] review management's report on internal financial accounting controls,[296] and review the institution's compliance with certain laws and regulations.[297] The audits and reports prepared by the accountants are to meet the existing professional accounting standards as modified if necessary by the Federal Deposit Insurance Corporation (FDIC).[298]

---

[282] *See Peer Review Release*, *supra* note 274, at 11,669.

[283] *See id.* at 11,675.

[284] *See id.* at 11,676 & 11,677-78.

[285] *See* REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 70-73 (1987).

[286] *Id.* at 71 (1987).

[287] *See Peer Review Release*, *supra* note 274, at 11,673-74. A later survey of accountants indicated their strong preference for self-regulation, particularly in the area of ethical standards. *See* Cohen & Pant, *supra* note 49, at 47 & 53.

[288] *See* HANDBOOK OF ACCOUNTING AND AUDITING, *supra* note 273, at 45-20.

[289] *See Peer Review Release*, *supra* note 274, at 11,675.

[290] *See AICPA Members Approve Proposal to Require Mandatory SRO Membership*, 22 Sec. Reg. & L. Rep. (BNA) 80 (1990).

[291] *See* HANDBOOK OF ACCOUNTING AND AUDITING, *supra* note 273, at 45-2 (Supp. 1992).

[292] *See* Securities Act Release No. 6958A, 57 Fed. Reg. 45,287, 45,288 n.24 (1992) (noting that the SEC "will continue to monitor enrollment in and the peer review activities of the SEC Practice Section").

The FDIC is authorized to set qualifications for accountants performing the work required by the Act.[299] To be qualified, an accountant must have "received a peer review that meets guidelines acceptable to the [FDIC]."[300] The FDIC's implementing regulations adopt the guidelines of the AICPA's peer review process.[301]

Thus, by incorporating private standards in the Act, Congress effectively delegated to the accounting and auditing standard-setters the promulgation of standards for the financial institutions' financial reports as well as the accountants' review of those reports, management's internal control report and management's compliance report. And by requiring that accountants be approved in a peer review process, the FDIC delegated to peer-review organizations[302] the enforcement of those standards. If an accountant does not perform according to the required standards, there is the possibility of a qualified peer review opinion, resulting in disqualification under the Act. In addition to this delegation, the FDIC retains the independent authority to require additional or different auditing standards[303] and accounting standards,[304] and may also institute its own enforcement actions against an accountant which may result in that accountant's disqualification.[305]

---

[293] Pub. L. No. 102-242, 105 Stat. 2242 (1991) (codified as amended in scattered sections of 12 USC).

[294] *Id.*, Title 1, §112(a), codified at 12 USC §1831m.

[295] 12 USC §1831m(d).

[296] *Id.* §1831m(c). The institution's management is required to report annually on the institution's internal controls and the effectiveness of those controls. *Id.* §1831m(b)(2)(A)(ii), (b)(2)(B)(ii).

[297] *Id.* §1831m(e). The institution's management is required to report annually on the institution's procedures for ensuring compliance and its actual compliance with "laws and regulations relating to safety and soundness" as designated by federal regulators. *Id.* §1831m(b)(2)(A)(iii), (b)(2)(B)(ii).

[298] *Id.* §1831m(c)(2), (d)(1), (e)(2), (f)(1).

[299] 12 USC §1831m(g)(3).

[300] *Id.* §1831m(g)(3)(A)(ii).

[301] Annual Independent Audits and Reporting Requirements, 58 Fed. Reg. 31,332, 31,338 (1993) (guidelines for compliance stating that "[t]he peer review should be generally consistent with AICPA standards").

[302] For a description of the SECPS, the only existing peer review organization, see *supra* notes 278-279 and accompanying text.

In both instances, the proposed SEC program and the new FDICIA requirements, effective programs of self-regulation were or would have been created. The bulk of standard-setting and review would be delegated to the private groups with the expertise and incentive to enforce them.[306] The ability of the government to achieve a federal mandate in the financial institution area, but the failure of the SEC to adopt mandatory peer review for auditors of public companies generally, can probably be attributed to the more intense general public concern over bank and thrift failures in the late 1980s compared to the concern over audit failures in the late 1970s and early 1980s.

B. Accreditation for Government Benefit Programs

The other major longstanding use of audited self-regulation is the qualification of recipients under government benefit or grant programs. The use of private accrediting organizations, a form of audited self-regulation, is prevalent under certain programs in health care and education.

1. Health Care Financing

a. Hospitals and Other Providers and Suppliers

Under the federal programs of Medicare[307] and Medicaid,[308] payments are made by the Health Care Financing Administration of the Department of Health and Human Services to health care providers and others who treat eligible patients. Medicare and Medicaid benefits, for example, are available for inpatient hospital services.[309] A hospital, however, must meet several requirements regarding licensing, types and qualifications of staff, operations, environment, quality assurance, and recordkeeping before it is eligible to receive Medicare reimbursement for services rendered.[310] The Act and regulations provide that, in certain instances, accreditation of the hospital by the Joint Commission on Accreditation of Health Care Organizations (JCAHO)[311] shall be deemed to be compliance with the above statutory conditions.[312]

---

[303] *See* 12 USC §1813m(f)(1) (noting that reports prepared by accountants under the act shall meet "generally accepted auditing standards and other applicable standards recognized by the [FDIC]").

[304] A separate section of the Act, P.L. No. 102-242, §121 (1992), codified at 12 USC §1831n, concerns accounting standards. The FDIC and other financial institution regulators are given the authority to require different standards no less stringent than generally accepted accounting principles.

[305] §12 USC §1831m(g)(4)(A). *See also* Annual Independent Audits and Reporting Requirements, 57 Fed. Reg. 42,516, 42,527 (1992) (restating independent enforcement authority in proposed rules).

[306] Cohen & Pant, *supra* note 49, at 46, suggest a combination of a common set of high moral and ethical values and a need to maximize self-interest which accounts for the willingness of the accounting profession to self-regulate.

[307] Health Insurance for the Aged Act, P.L. 89-97, Tit. I, pt. 1, 79 Stat. 290 (1965) (amending the Social Security Act of 1935) (codified as amended principally at 42 USC §§1395-1395ccc). Briefly summarized,

> [t]he Medicare program, designed to finance acute medical care primarily for elderly Americans, also covers some categories of the disabled and those with end-stage renal disease. The program is divided into two parts: Part A, which provides hospital insurance (HI), and Part B, which covers supplementary medical insurance (SMI). The HI component includes short-term hospitalization, skilled nursing care, and home health services, while the SMI portion covers physical services, outpatient hospital care, and laboratory fees, as well as home health care.

The JCAHO is a private organization sponsored by groups of health care professionals which predated the Medicare and Medicaid programs.[313] Currently,

---

ALAN L. SORKIN, HEALTH ECONOMICS 187 (3d ed. 1992).

[308] Health Insurance for the Aged Act, P.L. 89-97, Tit. I, pt. 2, 79 Stat. 343 (1965) (amending the Social Security Act of 1935) (codified as amended principally at 42 USC §§1396-1396u). Also briefly summarized,

> Medicaid is a combined federal and state program that provides medical assistance to certain categories of low-income persons, including those on welfare and some of the medically indigent (persons whose incomes are too low to pay for medical care). The program is administered and roughly half the costs are absorbed by the state and local governments.
>
> ....
>
> Mandatory eligibility is now required for persons receiving cash assistance under federally funded income-transfer programs. Therefore, persons eligible ... under Aid to Families with Dependent Children (AFDC) are automatically eligible for Medicaid. .... Persons who are mandatory recipients of Supplemental Security Income (SSI) — a federal program for the aged, blind, or disabled — are also automatically eligible for Medicaid ....
>
> Optional Medicaid beneficiaries are those for whom states may receive federal matching funds but whose coverage is not required by federal legislation. This group includes medically needy families with dependent children whose incomes are above the state AFDC limit, as well as elderly persons who do not qualify for cash assistance. Many of the latter have large medical or nursing home bills.

SORKIN, *supra* note 307, at 197-98. The two programs may overlap in coverage as well. "State Medicaid programs frequently serve to complement Medicare for low-income elderly persons. Medicaid may finance cost-sharing amounts as well as other noncovered services for eligible Medicare beneficiaries who are too poor to pay these bills." *Id.* at 187.

[309] *See* 42 USC §§1395d(a)(1) (Medicare coverage), 1396d(a)(1) (Medicaid coverage).

[310] *See id.* §1395x(e), 42 CFR §§482.21 - .42 (Medicare requirements for basic hospital functions). Identical requirements apply under Medicaid. *See* 42 CFR §440.10(a)(3)(iii) (hospital services must be provided at a hospital which "meets the requirements for participation in Medicare as a hospital").

[311] Originally the organization was known as the Joint Commission on Accreditation of Hospitals, but the Joint Commission now accredits several different types of health care facilities and programs, and changed its name in 1987. *See* Medicare and Medicaid Programs; Recognition of Joint Commission on Accreditation of Healthcare Organizations' Home Care Program Standards and the National League for Nursing's Standards for Home Health Agencies, 52 Fed. Reg. 49,510, 49,510 (1987).

[312] *See* 42 USC §1395bb (Medicare), 42 CFR §488.5 (Medicaid).

[313] JCAHO had its origins in efforts in the early 1900s by the American College of Surgeons to standardize conditions at hospitals, and to certify hospitals which met those minimum standards. *See*

JCAHO accredits most hospitals in the United States, not only for Medicare and Medicaid but for various other federal and state programs.[314] The remaining hospitals are evaluated for eligibility by HHS under contract with state survey agencies.[315]

The JCAHO-HCFA relationship is comparable with the model of audited self-regulation in the securities industry. At the outset of each program, the government was faced with the need to acquire expertise in a technical area involving several thousand regulated individuals and firms.[316] The relationship did not begin as one of audited self-regulation, however. JCAHO-accredited hospitals were conclusively deemed to meet conditions for Medicare participation, indicating Congress' deference to "professional" standards in 1965.[317] The "auditing" of the JCAHO and other accrediting agencies by HCFA was added in later amendments to the Act in 1972[318] and 1984[319] for Medicare, and by HCFA regulations for Medicaid.[320]

James S. Roberts, *A History of the Joint Commission on Accreditation of Hospitals*, 258 J. AM. MED. ASS'N 936, 937 (1987). For a comprehensive background and early history of the JCAHO, see Timothy S. Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 B.C. L. REV. 835, 840-52 (1983).

[314] *See* Roberts, *supra* note 313, at 940.

[315] The Act requires HHS to contract with states willing to perform the survey and accrediting function of hospitals which do not have or seek JCAHO accreditation. 42 USC §1395aa(a). The results of those surveys are transmitted as recommendations to HCFA, which makes the final decision. *See* 42 CFR §§488.11 - .12. *See also* Timothy S. Jost, *Background: Medicare and the Joint Commission on Accreditation of Healthcare Organizations*, in PRIVATE ACCREDITATION IN THE REGULATORY STATE 1, 5 (materials prepared for conference sponsored by Am. Bar Ass'n Sec. of Admin. L. & Pract., May 21, 1993) (JCAHO accredits over 5,000 hospitals; "[a]pproximately 900 of the hospitals certified for participation in Medicare are not Joint Commission accredited. Rather they are certified by state survey agencies under contract with the Secretary.").

[316]

> [T]here was substantial political pressure to get the Medicare program fully operational rapidly. President Johnson, with a large political stake in Medicare, believed that its success depended on maximum access from the beginning of the program, and thus on immediate near universal hospital participation. Those who had to administer the program were greatly relieved to have a fully developed quality certification system ...

Jost, *supra* note 313, at 853-54. For a discussion of similar problems with broker-dealer regulation, see *supra* notes 176-178.

[317] "Linking the conditions for participation to the requirements of the Joint Commission provides further assurance that only professionally established conditions would have to be met by providers of health services which seek to participate in the program." S. REP. NO. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 USCC.A.N. 1943, 1970.

[318] JCAHO accreditation was stripped of its exclusivity in 1972. The Secretary was given independent authority to survey accredited hospitals and to "de-accredit" those which, despite JCAHO accreditation, did not meet the Act's requirements according to the Secretary. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, §244, 86 Stat. 1329, 1423 (1970) (codified at 42 USC §§1395aa(c), 1395bb(b)). These amendments were the result of consumer pressure on the JCAHO in the late 1960s and early 1970s, as well as reports that JCAHO standards were not kept high and were not well enforced. *See* Jost, *supra* note 313, at 855-56. These amendments may yet be mostly unrealized potential; "[i]mplementation of these amendments has been largely inadequate." *Id.* at 915.

Currently, the HCFA has access to the JCAHO accreditation survey for each accredited hospital,[321] may independently accredit or remove accreditation of a hospital,[322] retains authority to add more or different requirements for participation than those of the JCAHO,[323] and can hear informal appeals from denials of accreditation or findings of deficiencies by the JCAHO.[324] Similar oversight and independent regulatory authority were provided in HCFA's recent recognition of the CHAP[325] and the JCAHO[326] to accredit home health agencies for participation in Medicare and Medicaid.

In 1984, Congress amended the Medicare provisions to expand significantly the types of entities on which HCFA may rely to accredit private organizations for participation in Medicare.[327] HCFA has proposed general rules for recognizing any accrediting organization's accreditation as sufficient for participation in these programs.[328] These rules impose conditions similar to the hospital and home health agency rules discussed above with respect to oversight by HCFA,[329] and in addition provide HCFA with plenary authority to directly survey any accredited

---

[319] Audited self-regulation was given a boost in 1984 amendments which significantly expanded the list of health care providers whose qualification for Medicare could be determined by an outside accrediting agency. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, §2346, 98 Stat. 494, 1096 (1984) (codified at 42 USC §1395bb(a)). Congress' concerns in expanding the potential universe of self-regulators were primarily competence, *see* H.R. REP. NO. 861, 98th Cong., 2d Sess. 1330 (1984), *reprinted in* 1984 USCC.A.N. 1445, 2018 (their standards must be at least as stringent as the Secretary's, and must be satisfactorily applied), and the potential for undue restriction of services (the Secretary must assure that "the adoption of such standards will not adversely affect competition in the provision of Medicare health services"). *Id.*

[320] Although similar conditions for participation were not articulated under the Medicaid program, HCFA has by regulation made the conditions for participation in both programs equivalent. *See, e.g., supra* note 310 (hospitals), 42 CFR §§440.20(a)(3)(ii) (outpatient services), 440.40(a)(1)(ii) (skilled nursing facility services), 440.70(d) (home health agencies).

[321] *See* 42 USC §1395bb(a)(2).

[322] *See supra* note 315 and accompanying text.

[323] There are additional requirements, notably a utilization review plan, which are not "deemed" to be met by JCAHO accreditation. *See* 42 USC §1395bb(a)(3), 42 CFR 488.5(a). And the Secretary has the authority to adopt more stringent standards than the JCAHO. *See* 42 USC §1395bb(a)(4), 42 CFR §488.5(c). Although HHS has promulgated detailed conditions of participation for hospitals, *see generally* 42 CFR Part 482, it is much less detailed and less-frequently revised than the JCAHO standards. *See* Jost, *supra* note 315, at 6 (HHS standards include 13 conditions of participation, promulgated in 1986; JCAHO accreditation manual contains 28 chapters and is updated annually).

[324] *See* 42 CFR §488.6(f).

[325] Community Health Accreditation Program, a subsidiary of the National League for Nursing. *See* 57 Fed. Reg. 22,773 (1992).

[326] *See* 58 Fed. Reg. 35,007 (1993).

[327] *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, §2346, 98 Stat. 494, 1096 (1984). The background of prior law and the effect of this amendment are discussed in HCFA's proposed generic accreditation rules, 55 Fed. Reg. 51,434, 51,436 (1990) [hereinafter Generic Accreditation Rule].

[328] *See* Generic Accreditation Rule, *supra* note 327.

[329] *See id.* at 51,437 (description of validation surveys), 51,441 (proposed rule, to be codified at 42 CFR §488.7).

supplier or provider in order to evaluate the adequacy of the accrediting organization's decisions.[330]

The proposed generic accreditation rules differ markedly from HCFA's first attempt at general recognition of private accreditation. In 1982, HCFA proposed to recognize JCAHO accreditation of skilled nursing facilities, intermediate care facilities and home health agencies as sufficient for participation in Medicaid and Medicare (except for intermediate care facilities, which are not Medicare-eligible).[331] The proposed rule contained only a one-sentence description of HCFA's oversight ability and responsibility,[332] and was withdrawn after considerable public and congressional pressure.[333] The 1990 proposed rules reflect a greater understanding of the requirements for effective audited self-regulation consistent with the requirements set forth in Part II above.

The HCFA-JCAHO relationship has fared fairly well when measured against other costs, benefits and requirements of audited self-regulation. It has withstood all challenges based on the nondelegation doctrine to date.[334] There remains, however, significant controversy about the anticompetitive effects of public reliance on private accreditation.[335] In addition, HCFA has expressly

---

[330] *See* Generic Accreditation Rule, *supra* note327, at 51,437-38 (discussing review of accrediting bodies), 51,441-42 (proposed rule, to be codified at 42 CFR §488.9).

[331] *See* Medicare and Medicaid; Survey and Certification of Health Care Facilities, Proposed Rules, 47 Fed. Reg. 23,404 (1982).

[332] "We would also provide that HCFA may revoke deemed status of JCAH-accredited facilities if it determines that accreditation no longer provides reasonable assurance that the facilities meet Federal requirements." *Id.* at 23,406. *Compare id. with* Generic Accreditation Rule, *supra* note 313, at 51,437-38 (discussing review of accrediting bodies), 51,441-42 (proposed rule, to be codified at 42 CFR §488.9).

[333] Jost, *supra* note 313, at 844 & nn.63-64. HHS ultimately withdrew the proposal; *see* Jost, *supra* note 315 at 7.

[334] *See* Cospito v. Heckler, 742 F.2d 72, 86-89 (3d Cir. 1984). Although *Cospito* dealt directly only with the particular and somewhat distinct regulations governing psychiatric hospitals, the court indicated in dictum that a nondelegation doctrine attack on HCFA's reliance on private accreditation of general hospitals would also fail. *See id.* at 88. Professor Jost is critical of this analysis, noting that delegation to the JCAHO "reveals an obvious attempt by the legislature to confer benefits on the member groups of JCAH to secure their support," and as such "is a suspect delegation." Jost, *supra* note 313, at 921. He finds especially pernicious the virtually absolute power of the JCAHO over psychiatric hospitals in certain circumstances where accreditation of one or more "distinct parts" of the hospital is not possible. *See id.* Interestingly, it was this "separate part" accreditation which the court relied on in *Cospito, see supra,* 742 F.2d at 87-88, over a vigorous dissent. *See Cospito, supra,* at 90-91 (Becker, J., dissenting).

[335] For a comprehensive summary of the procompetitive and, in the author's opinion, the dominant anticompetitive effects of private accreditation especially as currently conducted by the JCAHO, see Clark C. Havighurst, *The Place of Private Accreditation Among the Instruments of Government* in PRIVATE ACCREDITATION IN THE REGULATORY STATE (materials prepared for conference sponsored by Am. Bar Ass'n Sec. of Admin. L. & Pract., May 21, 1993), and articles cited therein. For a similar comprehensive summary of antitrust arguments, finding objectionable anticompetitive conduct on the part of the JCAHO but noting then-recent reforms, see Jost, *supra* note 313, at 892-913.

In approving JCAHO's accreditation of home health agencies, HCFA noted some commenters' concerns that JCAHO accreditation of those agencies was explicitly tied to denied that cost savings, either overall or merely to the federal government, is a motivation in adopting this program of audited self-regulation. In both notices approving private accreditation of home health agencies, HCFA noted that the expenditures saved on direct surveys of providers and suppliers will be spent instead on oversight of the private accrediting organization, resulting in negligible overall costs or savings.[336]

b. Clinical Laboratories

The Clinical Laboratory Improvement Act of 1967 (CLIA)[337] requires certification by the Secretary for any laboratory to "solicit or accept materials derived from the human body for laboratory examination."[338] The 1967 Act relied on private accreditation of clinical laboratories, exempting certain privately-accredited laboratories from the certification requirement discussed above, with minimal oversight.[339] In rewriting CLIA in 1988, Congress extended its coverage[340] and added details to the accreditation process, consistent with principles of sound audited self-regulation, which were missing from the 1967 Act.

JCAHO accreditation of the hospital to which the home health agency was connected, and one was required as a condition of the other. HCFA demurred, noting simply that

> [t]he Medicare Act does not restrict the ability of a home health agency to choose among accrediting organizations. It is also our general belief that competition is a healthy force in the marketplace. .... We have raised the issue with the JCAHO, and believe that the Commission itself is taking steps to deal with the emergence of other accrediting bodies.

58 Fed. Reg. 35,007, 35,010-11. Implicit in this response is that this "tying" by the JCAHO does raise some anticompetitive concerns.

[336] *See* 58 Fed. Reg. 35,007, 35,017 (recognition of JCAHO accreditation; regulatory impact statement cost/benefit analysis); 57 Fed. Reg. 22,773, 22,779 (recognition of CHAP accreditation; same).

[337] CLIA was added in 1967 as §353 of the Public Health Service Act of 1944. Pub. L. No. 90-174, 81 Stat. 536 (1967) (codified as amended at 42 USC §263a).

[338] 42 USC §263a(b). As the text makes clear, federal regulation of clinical laboratories is not limited to those participating in Medicare or Medicaid. Strictly speaking, therefore, this is not entirely a program of accreditation for government benefits, as indicated in the caption to this Part IV.A.2, but is a program of general health and safety regulation. Nonetheless, it is discussed here because it is partly related to the Medicare and Medicaid programs and follows a similar pattern of reliance on private accrediting organizations.

[339] The statute named the JCAHO, the American Osteopathic Association and the College of American Pathologists as approved private accrediting organizations, and permitted the Secretary to approve other accrediting organizations. These organizations were required only to assure that their standards were equal to or more stringent than the governing federal standards as established by statute and regulation, and that each accredited laboratory continued to meet those standards. *See* Clinical Laboratories Improvement Act Program, Final Rule, 57 Fed. Reg. 33,992, 33,992 (1992) [hereinafter 1992 CLIA Release].

[340] Under the 1967 Act, only laboratories in Medicare or Medicaid or testing specimens in interstate commerce were subject to the certification requirement. *See id.* at 33,992. Compare this limited coverage with the blanket coverage of all laboratories in the 1988 Act, *supra* note338 and accompanying text.

The 1988 Act requires accrediting organizations to inspect laboratories with qualified personnel and as frequently as the Secretary requires, to report any denials, and permits the Secretary to adopt additional criteria.[341] In addition, each accredited laboratory must submit to inspection by the Secretary at any time,[342] make its records available directly to the Secretary,[343] and authorize the accrediting organization to make its inspection reports available to the Secretary.[344] HCFA's implementing regulations essentially impose most of the requirements of audited self-regulation: the accrediting organizations must demonstrate that they have the capacity and capability to require compliance with the Act by the accredited laboratories,[345] and are subject to comprehensive review by HCFA in a periodic sample or in response to allegations of noncompliance.[346]

Closer oversight of the accrediting organizations was necessary, according to the 1988 Act's legislative history, because those organizations did not view enforcement as an integral part of their mission.[347] This reinforces a primary component of self-regulation: the ability to alter conduct. To the extent that any private accrediting organization considers itself to be only "educational," its program is actually one of self-certification only. However, implicit in almost every instance is the ability of the accreditor or auditor to hold the possibility of an adverse decision over the regulated entity if "suggested" changes are not made. The success of this type of action determines whether there is any effective enforcement at the self-regulator's level.

In addition, Congress mentioned cost savings to the federal government as a rationale for private accreditation.[348] However, it is clear that the total cost of regulation to the nation's accrediting organizations, and thus to clinical laboratories, providers, and ultimately to patients, will be higher,[349] even if the federal government's share has been successfully transferred to other entities.

---

[341] *See* 42 USC §263a(e).

[342] *See id.* §263a(d)(1)(C).

[343] *See id.* §263a(d)(1)(D).

[344] *See id.* §263a(e)(1)(B).

[345] *See* 42 CFR §493.506.

[346] *See id.* §493.507 - .511.

[347]

> [T]he Committee ... discovered that reliance on private accreditation has created weaknesses in the administration of quality standards. The Department has effectively delegated all responsibility for enforcement to accrediting bodies. Yet, those bodies have made plain their preference and capacity is for education, not enforcement. Education is an important but limited tool in enforcement.

H.R. REP. NO. 899, 100th Cong., 2d Sess. 13(1988), *reprinted in* 1988 USCC.A.N. 3828, 3834.

[348] *See id.* ("The Committee recognizes that accrediting bodies are committed to assuring quality in laboratory testing and that they conserve federal resources by substituting for public agency surveys.").

[349] One private accrediting organization estimated that it would have to double its fees to comply with the regulations promulgated pursuant to the 1988 Act. *See* 1992 CLIA Release, *supra* note 339, at 34, 010.

c. Peer Review of Medicare Services

Payments under Medicare[350] to providers and suppliers are restricted to eligible patients and services. The most far-reaching limitations, however, are that the service or product must be "reasonable and necessary"[351] and for actual treatment of an illness.[352] Congress had provided for a program of audited self-regulation in applying these particular restrictions and also in determining whether the quality of care provided meets professional standards or could have been provided at a lower cost.[353] This program is known as "peer review," and is provided by Peer Review Organizations (PROs) under contract with HCFA.[354]

PROs are charged with reviewing samples of health care activities subject to payment under Medicare in their geographic areas.[355] If the PRO determines that treatment was not "reasonable and necessary" or could have been provided at a lower cost, it has the ability to deny Medicare reimbursement.[356] And if the PRO determines that the quality of care provided by any person does not meet cost and quality standards, it may deny to that person any further ability to receive Medicare reimbursement.[357] In total, then, it is clear that "[t]he power of PROs over Medicare providers, practitioners, and beneficiaries is sweeping."[358]

The existing peer review process had two predecessors. Initially, in 1965, hospitals were required to have a utilization review plan in order to qualify for Medicare reimbursement.[359] In 1972, dissatisfaction with the focus of the utilization review program on quality of care to the exclusion of escalating costs due to over-utilization led Congress to create the Professional Standards Review Organization (PSRO) program.[360] The PSRO program used "regional nonprofit physicians groups to review independently the use of medical services by beneficiaries of federal medical assistance programs."[361] However, the PSROs could delegate their review functions to hospital review committees, and PSRO recommendations for denial of payment had no binding effect. These two factors were prime contributors to the inability of the PSRO program to either provide consistent utilization guidelines or cost control.[362] As a result, "PSROs never succeeded in meeting the expectations of their supporters or overcoming the criticisms of their increasingly vocal detractors."[363] By the late 1970s, criticism of the PSRO program was mounting, and Congress adopted the PRO system, along with a new method of calculating hospital reimbursements under Medicare, in 1982.[364] The PROs cover a larger geographic area, cannot delegate review functions, and have broader powers to deny payment.[365] Despite the much larger area coverage,[366] the PRO was intended to be a physician-sponsored group, akin to a medical society.[367] Although no longer local, most PROs are physician-sponsored, and to that extent conform to the model of self-regulation.[368] The combination of a fixed-sum Medicare payment determination, based on the diagnosis, and the limited review of PRO denials[369] of payments was intended to create a system with much greater emphasis on cost containment.

---

[350] For a brief summary of Medicare coverage, see *supra* note 307.

[351] 42 USC §1395y(a)(1).

[352] *See id.* §1395y(a)(9).

[353] *See id.* §1320c-3(a).

[354] *See id.* §1320c-2(a).

[355] *See id.* §1320c-3(a)(1), 42 CFR §466.71(c). For a discussion of the sampling and review process, see Timothy S. Jost, *Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations*, 50 OHIO ST. L.J. 1, 6-9 (1989).

[356] *See* 42 USC §1320c-3(a)(2), 42 CFR 466.71(a).

[357] *See* 42 USC §1320c-5(b), 42 CFR §466.71(b). "As a practical matter, exclusion from Medicare may make it impossible for a physician to practice; thus the PRO's power over physicians is nearly as great as that of state licensure boards." Jost, *supra* note 355, at 2.

[358] Jost, *supra* note 355, at 2.

[359] *See* 42 USC §1395x(e)(6). The requirement remains today, but is superseded for all practical purposes by the PRO program, since no utilization review requirement is imposed where a PRO has assumed binding review for the hospital. 42 CFR §482.30(a)(1). *See* Peter M. Mellette, *The Changing Focus of Peer Review Under Medicare*, 20 U. RICH. L. REV. 315, 323 (1986).

[360] Jost, *supra* note 355, at 4-5; Mellette, *supra* note 359, at 326-28. *See* Pub. L. No. 92-603, §249F(b), 86 Stat. 1329, 1429 (1972). This is the same Act which significantly curtailed the role of the JCAHO in accrediting hospitals under Medicare; *see supra* note 318 and accompanying text.

---

[361] Jost, *supra* note 355, at 5. "PSRO proponents in Congress anticipated that local medical societies would apply for and receive PSRO designation." Mellette, *supra* note 359, at 328. *See also* BLUM ET AL., *supra* note 161, at 21-26 (discussing problems in implementation of PSRO program regarding size of PSRO area and local physician acceptance).

[362] *See* Mellette, *supra* note 359, at 340 (delegated review), 350 (nonbinding effect of denials).

[363] Jost, *supra* note 355, at 5.

[364] *See* Mellette, *supra* note 359, at 337-41. For a brief description of the operation of this "diagnosis-related group" (DRG) method of prospectively determining payments to be made to hospitals under Medicare, see 42 CFR §412.1(a). The adoption of the DRG method also changed the magnitude of decisions the new PROs would be required to make regarding utilization of hospital services, which was "the object of much review activity by PSROs." Mellette, *supra*, at 341.

[365] Jost, *supra* note 355, at 5.

[366] In designating the PSRO areas, HEW chose a minimum population size of 50,000. BLUM, ET AL., *supra* note 161, at 21-22. By contrast, each PRO was to cover an entire state. Jost, *supra* note 355, at 5.

[367] The local medical society was one of the models for the PSROs. *See supra* note 361.

[368] *See* Jost, *supra* note 355, at 6 (noting that 84% of PSROs are physician-sponsored). The others are typically insurance companies. Although they employ physicians in medical payment reviews, *see id.*, the insurance company PSRO is different from the model of self-regulation used in this study, since the self-regulatory organization can be said to be composed of the regulated entities only a very indirect way. *See supra* Part I.A.

[369] This finality of the self-regulatory organization decision is unusual in models surveyed in this study. Although a beneficiary has a right to appeal outside of the PRO, the practitioner or provider who supplied the goods or services has a right only to a reconsideration from the PRO. *See* 42 USC §1320c-4. Although later amendments to the PRO act required consultation between the PRO and the provider before the decision to deny payment is made, the finality of that decision was not altered. *See* Jost, *supra* note 355, at 67. Although this lack of judicial review is disturbing from the standpoint of proper design of a

Throughout the development of peer review programs in Medicare, it was considered paramount to enlist private entities in the regulatory effort, for at least two reasons which often appear whenever audited self-regulation is considered. First, there was significant pre-existing peer review activity. The medical profession had recognized the need for peer review as early as the early 1900s.[370] Second, the alternative of direct government regulation has always been considered problematic not only because of the staffing requirements but because of the perceived impact of that regulation on the treatment decisions of physicians. Thus, the federal government has relied from the outset on the professional discretion of practicing physicians.[371] At each turn, however, Congress became increasingly frustrated with the profession's emphasis on quality of care, to the apparent exclusion of effective cost control.[372] It is impossible to fault the medical profession for their focus, indeed, it is likely that physicians could not make medical decisions on any other basis.[373] However, that focus resulted in the government regulators' removal of much of the discretion

---

self-regulatory system, it has minimal practical impact due to the relatively small amounts in controversy in each case. *Id.* at 66-67.

[370] *See* BLUM ET AL., *supra* note 161, at 1-2 (early developments in peer review); MEDICAL PEER REVIEW: THEORY AND PRACTICE 11-12 (Paul Y. Ertel & M. Gene Aldridge eds. 1977) (early 20th-century developments in the practice of medicine leading to the necessity of peer review). *See also* Mellette, *supra* note 359, at 324-26 (discussing specific hospital-based programs developed in the 1940s and 1950s).

[371]

> Government involvement with peer review since 1965 gives evidence of two definite trends: First, the government's desire to delegate the review task to physician committees; and second, the government's inability to settle on an acceptable review methodology. Government review delegation can be attributed to both a lack of manpower and a wish to temper governmental control over review to make it more acceptable to the medical profession.

BLUM, ET AL., *supra* note 161, at 3. *See also* Mellette, *supra* note 359, at 327-28 (emphasis on cost control but also on professional judgment and discretion in 1972 amendments); S. REP. NO. 494, 97th Cong., 2d Sess. 42 (1982), *reprinted in* 1982 USCC.A.N.781, 817 (report on 1982 amendments, noting that "peer review has afforded practicing physicians an opportunity on a voluntary and publicly accountable basis to undertake review of the medical necessity and quality of care provided. The [PSRO] program has demonstrated that the concept of peer review is a valid one.")

[372] *See* Jost, *supra* note 355, at 4-6, Mellette, *supra* note 359, at 326-27 (cost-control shortcomings of utilization review) & 334-35 (cost-control shortcomings under PSRO program).

[373] Professors Havighurst and Blumstein examined in detail how physicians determined "need" in relationship to cost of services, *see* Clark C. Havighurst & James F. Blumstein, *Coping With Quality/Cost Trade-offs in Medical Care: The Role of PSROs,* 70 NW. U. L. REV. 6, 25-38 (1975). They concluded

> a sincere concern for his patients' welfare is probably dominant in [the individual physician's] numerous decisions for more and better services. Cost issues, while sometimes admitted, are seen as irrelevant when life, health, and comfort and convenience — in short, the needs — of the patient are at stake. Indeed, with cost constraints lifted by the availability of third-party payment, the physician may regard it as his ethical responsibility to help the patient get all the benefits he can from the common fund.

Id. at 27.

from the self-regulatory system. This suggests, as in the case of health and safety regulation generally,[374] it is difficult for a self-regulatory program to succeed if opposing groups are not given meaningful input in the process.[375] Until the PRO program, cost containment policies had no effective place in peer review, since the only party seeking cost control, the federal government, was by definition removed from the self-regulatory process. The question still remains the appropriate level of government intervention in the cost-quality tradeoff,[376] and how much of this decision-making should be delegated to any private group.[377] But the progression from utilization review to PSRO to PRO in the peer review process has demonstrated the ability of Congress, HCFA and the health care professionals and industry to successively balance, shift and rebalance the elements of an effective system of self-regulation, a process that promises to continue.

2. Higher Education Financing

A variety of federal laws in aid of postsecondary education have been enacted since the end of World War II, providing aid for programs, capital construction, and significant aid to students. Typically, that federal aid has been limited to institutions which meet minimum standards, so that today "[m]ost postsecondary institutions and programs attain eligibility for federal funds by obtaining accreditation from one of the accrediting bodies recognized by the Secretary [of Education]."[378] Those standards, in turn, have been provided primarily by private accrediting organizations, subject to an unusual and often controversial oversight role by the Department of Education.

---

[374] *See supra* text accompanying note 108.

[375]
> [I]n a regulatory environment, organized consumer pressure is likely to be opposed to stringency and to favor increased quantities and quality of care, especially where such care is at public expense. Provider interests would of course take similar positions.
>
> [T]he functioning of governmental and professional decision-making mechanisms is impaired, though in varying degrees, by the quality imperative and cost-escalating pressures from interest groups ... .

Havighurst & Blumstein, *supra* note 373, at 63.

[376] *See* Mellette, *supra* note 359, at 354 ("PRO review groups are now making many of the same decisions on patient admissions that the attending physician made a few years ago. ... . The government's role in the health care marketplace under prospective payment and the PRO Act has shifted from that of a partner to a controlling interest."). Congress itself seems unsure of the appropriate cost-quality mix, since despite this increasing emphasis on cost control which led to the PRO program, most legislation since has related to potential problems with lower quality health care. *See* Jost, *supra* note 355, at 5-6. For a comprehensive discussion of this cost-quality tradeoff, see Havighurst & Blumstein, *supra* note 373. A more recent review of the prospective payment system, *see supra* note 364 and accompanying text, suggests that it does not help to control costs, because although it "does recognize legitimate deviations from the norm, ... the norm and the allowed variations are managed at such a great conceptual, spatial and regulatory distance from our hospitals that the regulatory task is essentially unmanageable. For those reasons there will continue to be a wide gulf separating our federal regulators from those working within actual institutions." David M. Frankford, *The Medicare DRGs: Efficiency and Organizational Rationality*, 10 YALE J. ON REG. 273, 345 (1993).

[377] Jost, *supra* note 355, notes, for example, the tensions that exist in the PROs sanctioning of providers or suppliers, "by far the most controversial function of the PRO program." *Id.* at 30. "Many of the difficulties of the PRO sanction process can ultimately be traced to the difficulty of engrafting enforcement functions onto what is basically a peer monitoring and education program." *Id.* at 47.

The statutory basis of federal reliance on private accreditation of institutions of higher education was laid principally in the Korean GI Bill.[379] Student aid was available only for courses offered by an institution "accredited and approved by a nationally recognized accrediting agency or association," and the then Commissioner of Education was required to publish a list of such "nationally recognized" agencies.[380] That language was borrowed by later acts providing a variety of federal assistance, providing in each instance that the Commissioner should prepare a list of accrediting organizations recognized under each act.[381]

The system of self-accreditation embraced by Congress dates back slightly more than a century. At that time, colleges began to coordinate their admissions standards and seek some uniformity in preparation in the secondary schools.[382] This concern with uniformity and the lack of an acceptable definition of a "college," extended the accreditation effort to institutions of higher education by 1913.[383] From this beginning grew the six regional associations of colleges which today accredit thousands of institutions of higher education on a general or institution-wide basis.[384] There developed along parallel tracks two other types of accrediting bodies: one for proprietary (for-profit) institutions, which were excluded from the regionals,[385] and another type for specialized accreditation for programs, schools or colleges within the institution.[386]

The early emphasis of accreditation was on uniformity of standards, first for secondary and then for higher education.[387] But the later and modern emphasis is on the assessment of the institution's compliance with its own standards and progress toward its own goals.[388] Thus, private accreditation is today not a comparison to of uniform standards, but rather a judgment by peers that an educational institution has set its goals and ways to meet them.[389] The move away from standardization once basic admissions and other rules were set is not revolutionary but rather a return to the norm. Higher education in the United States has a tradition of diversity in and local control over academic programs predating accreditation programs.[390]

---

[378] KAPLIN, *supra* note 130, at 573.

[379] Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663 (1952).

[380] *Id.* §253, 66 Stat. at 675 (repealed 1958). For a comprehensive legislative background, see Matthew W. Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate,* 2 J.L. & EDUC. 339, 343-47 (1973).

[381] *See* Finkin, *supra* note 380, at 348-68 (citing 15 acts passed during the 1958-72 period dealing with institutional or special accreditation); YOUNG ET AL., *supra* note 41, at 240 ("[t]his language reappeared in new legislation as 'boiler plate' over the next thirty years").

[382] *See* WILLIAM K. SELDEN, ACCREDITATION 30-31 (1960) (discussing the foundation of the first regional association, the New England Association of Colleges and Secondary Schools, in 1885).

[383] *See id.* at 35-38; YOUNG ET AL., *supra* note 41, at 3.

[384] *See* YOUNG ET AL., *supra* note 41, at 26-28 (describing the six regional accrediting associations and their membership).

[385] *See id.* at 29.

[386] *See id.* at 24, KAPLIN, *supra* note 130, at 561-62, Oulahan, *supra* note 130, at 193 (each describing differences between institutional and specialized accreditation). The national accrediting bodies, *see supra* note 384, are institutional accrediting organizations.

[387] *See* YOUNG, ET AL, *supra* note 41, at 56; SELDEN, *supra* note 382, at 42.

Part of the tradition of local control of higher education, of course, is a lack of federal control. Even with the extensive institutional and student aid programs of the postwar era, there is little federal control over basic decisions about what should be taught in United States colleges and universities.[391] When Congress began the aid programs in 1952, it chose to rely on accrediting organizations in part to avoid any such federal control,[392] and in part because the accrediting organizations were recognized as expert and reliable.[393]

---

[388] *See, e.g.*, SELDEN, *supra* note 382, at 42 ("As proportionately more colleges and universities have been accredited — that is, accepted into membership of the regional associations — increasing emphasis has been placed upon ... stimulating institutional self-improvement [rather than admissions or maintenance of minimum academic standards]"). Another writer describes the change comparatively.

> During the past seventy years, accreditation has changed —
>
> - From a quantitative approach (expressed in scientific requirements) to a qualitative approach (based on more general standards).
> - From an emphasis on making institutions more alike to recognizing and encouraging institutional individuality.
> - From a system heavily dependent on external review to a system based more on self-evaluation and self-regulation.
> - From an initial focus on judging (and accepting or rejecting) an institution to a primary goal of encouraging and assisting an institution to improve its educational quality.

YOUNG, ET AL., *supra* note 41, at 9.

[389]
> [Accreditation] is distinctive in postsecondary education for its respected and carefully developed procedures, based on three fundamental precepts: (1) that the institution must publicly declare its educational purposes and should be evaluated primarily on that basis, (2) that the institution should play the major role in accreditation through the self-study process, and (3) that peer review serves as a necessary validating mechanism.

YOUNG ET AL., *supra* note 41, at 66. *Accord,* Oulahan, *supra* note 130, at 198-99.

[390] *See* SELDEN, *supra* note 382, at 17-20.

[391] This is not to say that federal laws do not have an impact on higher education; for a survey of the more important non-education laws affecting colleges and universities, see KAPLIN, *supra* note 130, at 473-511. However, funding is the main focus.

> The federal government's major function regarding postsecondary education is to establish national priorities and objectives for education spending and to provide funds in accordance with those decisions. To implement its priorities and objectives, the federal government attaches a wide and varied range of conditions to the funds it makes available ... . Cumulatively, these conditions exert a most substantial influence on postsecondary institutions, often leading to institutional cries of economic coercion and federal control. In light of such institutional criticism, the federal role in funding postsecondary education has become a major political and policy issue.

The Commissioner (later Secretary) of Education implemented these statutes by publishing the required list, and also by promulgating a list of standards to be met by any accrediting organization in order to be listed. The standards, though originally borrowed from a then-existing accreditation review organization,[394] were important because of the new federal imprimatur.[395] Despite this effect, the initial standards themselves were relatively innocuous.[396]

The criteria remained unchanged over the next 17 years, despite major developments in the relationship of federal law to private accreditation. By the mid-1960s, however, reliance upon accreditation had become commonplace, reaching perhaps its zenith in the Higher Education Act of 1965.[397] In addition,

---

Id. at 511. The idea of federal control of academic decisions, however, has remained an anathema. Congress has said as much, prohibiting any federal employee from directing or controlling "the curriculum, program of instruction, administration, or personnel of any educational institution." 20 USC§1232a.

[392] *See* Matthew W. Finkin, *Reforming the Federal Relationship to Educational Accreditation*, 57 N.C. L. REV. 379, 381 (1985).

[393] *See id.* (noting that reliance on accrediting agencies to avoid federal control requires that review by the federal government would be very limited). Others have less sophisticated explanations, suggesting that, as with the securities and health care accreditation decisions, manpower may have been a concern.

> [T]he more likely explanation is that Congress did not want to get the federal government embroiled in the thankless task of deciding which institutions would and, more important, which would not be eligible for the expanded funding. Accreditation was not that well understood, but the postsecondary education community seemed to have much faith in it.

YOUNG ET AL., *supra* note 41, at 251.

[394] See YOUNG ET AL., *supra* note 41, at 242 (concluding that the original 1952 criteria were "a slightly edited version of the [National Commission on Accreditation] criteria). See also; Finkin, *supra* note 380, at 347 (discussing development of original criteria).

[395]
> By publishing this first list, the federal government profoundly altered the nature of accreditation and, more important, its relationship to the postsecondary education community. First, the federal government had never previously purported to make an explicit statement about who was an accrediting body and what such a body did. ... . Second, accrediting bodies were now, by virtue of the statutory provision, judged to be both "recognized" and "reliable."

YOUNG ET AL., *supra* note 41, at 242.

[396]
> These required *inter alia* that: the scope of the organization be national or regional (i.e. encompassing several states); it serve a definite need; it perform no function that might prejudice its independent judgment; it make available to the public current information on its standards, operations, and accredited programs or institutions; it only accredit institutions which are found on examination to meet pre-established standards; it has some experience in accrediting; and, it has gained general acceptance of its criteria and decisions.

Finkin, *supra* note 380, at 347.

[397] Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended principally at 20 USC §§1001-1145f). Notable additions in the 1965 Act were reliance on accreditation for guaranteed student loans, and

Congress' single experiment with direct accreditation by the Commissioner of Education in 1964 was dismissed as a failure, and replaced in 1968 with delegation to multiple private accreditation organizations.[398] Thus, by the late 1960s, determination of nationally-recognized accreditation organizations had developed into a significant regulatory task.[399] Amendments to the criteria for "listing" in 1969 and 1974 changed the character of these criteria from "innocuous" to more proscriptive, relying less on the accrediting bodies and more on standards for their composition and operation.[400] In 1972 and 1976, Congress, concerned with continuing abuses in student loan programs, amended the Act to extend the Commissioner's direct regulatory authority over the administrative and financial capabilities of each individual institution of higher

---

in defining an "institution of higher education" for any purpose in the Act. *See id.* §435, 79 Stat. at 1247-48 (codified as amended at 20 USC §1085(b)), *id.* §801(a), 79 Stat. at 1269 (codified as amended at 20 USC 1141(a)); *see also* Finkin, *supra* note 380, at 359.

[398] *See* Finkin, *supra* note 392, at 383-85 and YOUNG ET AL., *supra* note 41, at 253, each referring to the Nurse Training Act of 1964, Pub. L. No. 88-581, 78 Stat. 908 (1964). Direct accreditation by the Commissioner was authorized in the act to accommodate the numerous unaccredited nurse training programs, and the "sheer force of numbers" would have forced him to do so. YOUNG ET AL., *supra*, at 253. However, the ultimatum was delayed until 1968 when Congress approved a compromise. "[T]he alternative chosen to deal with the problem was to increase the number of alternative agencies that could be relied upon, rather than to continue the system of direct federal accreditation (which had never actually been used) or to authorize administrative controls over the private agency." Finkin, *supra*, at 385.

> Congress apparently learned an important lesson from this episode and was cautious about making specialized accreditation a requirement for eligibility in the future. In fact, in the few cases in which it did, such as medical and dental capitation grants, virtually all the schools were accredited by well-established, nationally recognized accrediting bodies and had been for quite some time.

YOUNG ET AL., *supra*, at 253.

[399]
> In a fundamental turnabout, the Office of Education now saw itself as a guardian and protector of the rights of recognized accrediting bodies. ... .
>
> As always, with rights come responsibilities. ... . No longer would OE have to seek out the accrediting bodies that presumably were doing reliable work for use in eligibility determinations. Rather, accrediting bodies would not be expected to petition OE and demonstrate that they deserved a place on the list.

YOUNG ET AL., *supra* note 41, at 255. This is probably the genesis of the Commissioner's and later Secretary's assumption of power "as a guardian and protector" which have been criticized as unauthorized by the underlying statutes. *See* Finkin, *supra* note 392, at 390-402 and *supra* note 380, at 370-74.

[400] *See* Finkin, *supra* note 392, at 385-87; YOUNG ET AL., *supra* note 41, at 256-63.

> These revisions express a fundamental lack of confidence that accrediting agencies adequately function to protect the public interest. They are premised upon the perceived need to make listed accrediting agencies more responsive to the demands of consumer protection, the need for educational change, and the observance of ethical institutional practices, both directly, by so providing in the recognition criteria, and indirectly, by changing the composition of the governing bodies of listed accrediting agencies.

Finkin, *supra*, at 386-87. Or, as Young et al. state more succinctly, "[t]hese new regulations made the commissioner the conscience of education and the public about which accrediting bodies were good and how they could be better." YOUNG ET AL., *supra*, at 259.

education.[401] Significantly, though, Congress did not alter the role of accreditation, but rather sidestepped it, targeting needed reforms with direct regulation.[402] The criteria for "listing" of accrediting organizations were reorganized and expanded once again in 1988, the major changes being addition of examination of assessment of student achievement and limitations on "shopping" for accreditation by institutions.[403] Even these changes drew concerns from commentators that the Secretary was unduly interfering in educational programs.[404]

Much of this landscape was swept clean in the Higher Education Amendments of 1992.[405] Prior recommendations of the Secretary's statutory advisory council recognized a "triad" partnership among the federal and state governments and the private accrediting agencies.[406] Congress essentially codified this triad relationship, specifying requirements for state review,[407] direct federal regulation similar to that begun in the 1970s,[408] and most importantly, Secretarial recognition of accrediting agencies.[409] In particular, the 1992 Act requires the Secretary to detail by rule standards with which to measure each accrediting organization's evaluation of each institution's performance in twelve specific areas which form the core of an institution's educational program.[410]

---

[401] *See* Education Amendments of 1976, Pub. L. No. 94-482, §133(a), 90 Stat. 2081, 2150-51 (repealed 1980). Similar provisions already existed regarding the guaranteed student loan program, having been added in 1972; the 1976 Act extended these requirements to other federal student aid programs. *See* S. REP. No. 882, 94th Cong., 2d Sess. 33 (1976), *reprinted in* 1976 USCC.A.N. 4713, 4744.

[402] *See* Finkin, *supra* note 392, at 390 ("the post-1968 legislation indicates that when Congress sought to tighten controls over institutional activity unrelated to educational quality, to effect policies of consumer protection or financial responsibility, it chose to act directly by means unrelated to the system of institutional or programmatic accreditation"). *Accord,* YOUNG ET AL., *supra* note 41, at 262-63.

[403] *See* Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, 53 Fed. Reg. 25,088, 25,088-89 (1988) [*hereinafter* 1988 Accreditation Rules].

[404] *See id.* at 25,089-90.

[405] Pub. L. No. 102-325, 106 Stat. 448 (1992).

[406] *See, e.g.,* 1988 Accreditation Rules, *supra* note 403.

[407] *See* Pub. L. No. 102-325, §499, 106 Stat. 448, 635-37 (1992) (codified at 20 USC §§1099a to 1099a-3).

[408] *See id.* §499, 106 Stat. at 647-52 (codified at 20 USC §§1099c & 1099c-1). For a discussion of prior legislation, see *supra* notes 401-402 and accompanying text.

[409] *See* Pub. L. No. 102-325, §499, 106 Stat. 448, 642-46 (1992) (codified at 20 USC §1099b).

[410] These areas are:

(A) curricula;
(B) faculty;
(C) facilities, equipment, and supplies;
(D) fiscal and administrative capacity as appropriate to the specified scale of operations;
(E) student support services;
(F) recruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising;
(G) program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials conferred;

The program of recognizing accrediting agencies bears many of the hallmarks of audited self-regulation. There was a preexisting self-regulatory program, with an economic or institutional and professional incentive to make that self-regulation meaningful. The regulators had collected expertise not easily reproduced by outsiders, in their professional judgment as educators. And they were a ready source of manpower, saving the federal government from the expense of duplicating their efforts with federal employees. Until the 1992 Act, however, any meaningful "auditing" was noticeably absent. The Act requires the Secretary to establish standards for measuring, among other things, the adequacy of the accrediting organization's standards, its enforcement of its own standards, and the fairness of the process used in determining to grant or withhold accreditation.[411]

However, several essential features are missing from this regulatory scheme when compared with a model of audited self-regulation. There is no appeal from the decision of the accrediting agency. There is no ability by the federal agency to specifically approve or adopt rules or standards for the accrediting organizations.[412] And most importantly, there is no independent federal authority to accredit or "de-accredit" individual institutions. All of these are features present in most other models of self-regulation, and as well in federal regulation of these same institutions' fiscal and administrative ability and responsibility.[413] This difference may be explained by the traditionally limited federal role in

---

> (H) measures of program length in clock hours or credit hours;
>
> (I) success with respect to student achievement in relation to its mission, including, as appropriate, consideration of course completion, State licensing examination, and job placement rates;
>
> (J) default rates in the student loan programs ...;
>
> (K) record of student complaints received by, or available to, the agency or association; and
>
> (L) compliance with its program responsibilities ... including any results of financial or compliance audits, program reviews, and such other information as the Secretary may provide to the agency or association.

20 USC §1099b(a)(5).

[411] *See* 20 USC §1099b(a)(4)-(6). There are no similar provisions in the existing regulations, except perhaps for 34 CFR §602.17(c), (e) & (g), requiring decisions based on published criteria, an "appropriate and fair" appeals process, and precluding conflicts of interest and inconsistent application of standards. Previously, the scope of "due process" in the accrediting decision, now addressed by 20 USC §1099(b)(6), was determined on a case-by-case basis. *See, e.g.*, Marlboro Corp. v. Ass'n of Indep. Colleges and Schools, 556 F.2d 78 (1st Cir. 1977); Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); Oulahan, *supra* note 130, at 223-26.

[412] Although the Secretary must develop "standards" to measure the standards by which the accrediting organization assesses individual institutions, *see* 20 USC §1099(b)(5), this is one-step removed from rulemaking or review.

[413] *See supra* note 408 and accompanying text.

higher education. The role of the Secretary is limited even by the 1992 Act,[414] and it has been suggested that the limited authority of the past did not even support that modest regulation.[415] And curiously, the idea of dropping the requirement of accreditation for access to these federal programs surfaces occasionally,[416] indicating that this scheme of reliance on private regulation is not entirely settled.

C. Nuclear Power Production

The Nuclear Regulatory Commission (NRC) has the responsibility of licensing the construction and operation of nuclear power plants.[417] Following the 1979 accident at Three Mile Island, the nuclear power industry created the Institute for Nuclear Power Operations (INPO) to set and police its own (industry) standards.[418] The NRC also began a program of improving its regulations. Ultimately, in the area of personnel training, the NRC adopted INPO's standards.[419] Enforcement power was not specifically delegated to INPO; however, the NRC noted that meeting INPO standards was essentially a condition of an initial or continuing license.[420] The NRC indicated that it would itself directly review INPO's accrediting procedures,[421] and would retain plenary enforcement authority.[422]

---

[414] 20 USC §1099b(g) prohibits the Secretary from establishing additional standards not required by the Act, but the accrediting agencies themselves are permitted to do so. And there is the overlay of §1232a, *see* note 391 *supra*.

[415] Professor Finkin argues stridently that many of the existing regulations are clearly beyond the scope of the Secretary's authority. *See* Finkin, *supra* note 380, at 370-74; Finkin, *supra* note 392, at 390-402.

[416] *See* YOUNG ET AL., *supra* note 41, at 266 (proposal in the 1980 reauthorization of the Higher Education Act); H.R. REP. NO. 447, 102d Cong., 2d Sess. 74 (1992), *reprinted in* 1992 USCC.A.N. 334, 407 (original bill ultimately becoming Higher Education Amendments of 1992, approved by committee, would have eliminated the accreditation requirement).

[417] *See generally*, 42 USC §§2131, 2133-2134, 10 CFR §§50.20-.23.

[418] *See* UNITED STATES GENERAL ACCOUNTING OFFICE, NRC'S RELATIONSHIP WITH THE INSTITUTE OF NUCLEAR POWER OPERATIONS 2 (1991) [hereinafter GAO REPORT]. "INPO was formed after the 1979 Three Mile Island accident to promote safety and reliability in the operation of nuclear power plants. INPO is a nonprofit corporation whose membership includes all operators of nuclear power plants in the United States." Critical Mass Energy Project v. NRC, 975 F.2d 871, 874 (D.C. Cir. 1992).

[419] The Commission adopted INPO's standards for training several categories of personnel, first on a temporary basis, *see* Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel, 50 Fed. Reg. 11,147 (1985) [hereinafter *1985 Policy Statement*] and then, after a period of review of INPO and licensee activities, on a permanent basis. *See* Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel, 53 Fed. Reg. 46,603 (1988) [hereinafter *1988 Policy Statement*]. For an overview of the INPO accreditation history and process, *see Accreditation of Nuclear Training*, NUCLEAR NEWS, Apr. 1993, at 46.

[420] Although the Commission's policy statement indicated that it considered INPO's accreditation as only one method of meeting the license requirements for personnel training, it was "understood" that each licensee would submit to the INPO standards. *See 1985 Policy Statement, supra* note 419, at 11,148. By 1990, all licensees had INPO-accredited training programs. Walter J. Coakley, *Training and Accreditation in the Nuclear Power Industry*, NUCLEAR NEWS, Apr. 1991, at 48.

The NRC thus found effective use of audited self-regulation superior to direct regulation. By taking advantage of a preexisting or at least contemporaneous industry organization with the incentive to engage in meaningful self-regulation, the NRC was able to endorse that organization's regulatory standards as its own. Ultimately, the scheme foundered for failure to comply with the statutory directive that the NRC "promulgate regulations, or other appropriate guidance for the training and qualifications of civilian nuclear power plant [personnel]."[423] The D.C. Circuit ultimately held that the NRC's reliance on INPO was not sufficient,[424] and the NRC has since promulgated final rules of its own directly mandating training program standards, and indicating that accreditation will constitute compliance.[425] The past NRC Chairman has noted that similar initiatives are needed in the area of plant maintenance.[426] Like training, the regulation is suitable for audited self-regulation, as the rules are technical and widely divergent depending on the particular regulated entity involved.[427] To date, however, in part due to legal challenges[428] and public and congressional scrutiny,[429] the NRC is not able to rely on INPO regulations or standards to any meaningful extent.

---

[421] *See 1985 Policy Statement, supra* note 419, at 11,148 ("To assure that the nuclear industry's training program improvements are effective, the NRC will continue to closely monitor the process and its results ... .").

[422] *See id.* at 11,148, *1988 Policy Statement, supra* note 419, at 46,604 (removing statement of discretionary enforcement from 1985 Policy Statement for violations of the accreditation requirement).

[423] 42 USC §10226.

[424] *See* Public Citizen v. NRC, 901 F.2d 147 (D.C. Cir.), *cert. denied,* 498 U.S. 922 (1990).

[425] *See* Training and Qualification of Nuclear Power Plant Personnel, 58 Fed. Reg. 21,904, 21,908 (1993). The Commission will rely on private accreditation and will conduct its own inspections of nonaccredited programs. *Id.* This is reminiscent of the SEC's "SECO" program of broker-dealer regulation; *see supra* notes 202-204 and accompanying text.

[426] *See Carr: Looking at Maintenance, Standardization, Industry "Coziness,"* NUCLEAR NEWS, Nov. 1989, at 36 (interview with then-NRC-Chairman Kenneth M. Carr) ("What I want to see is some sort of a system that gets good maintenance accomplished .... We must have something — either a rule put out by us or something the utilities do, like they did with their training program.")..

[427] *See id.* ("It's hard to write a good maintenance rule. In the first place, there are too many different kinds of plants, so you can't write a rule to cover them all. And rules must be enforced, so you've got to be careful what you put in them.")

[428] *See supra* note 424 and accompanying text.

[429] *See* GAO REPORT, *supra* note 418, at 1 (indicating that the report was prepared upon the request of several congressmen). The report ultimately concluded that the NRC does not rely to a great extent on INPO reports or information in its regulation, although the GAO recommended that the NRC itself issue public information notices based on INPO reports it receives, because the INPO reports themselves have been held to be exempt from public disclosure. *See id.* at 5-7; *see also* Critical Mass Energy Project v. NRC, 931 F.2d 939 (D.C. Cir. 1991) (holding certain INPO reports exempt from disclosure under the Freedom of Information Act).

D. Agricultural Marketing

In several areas, the Department of Agriculture's Agricultural Marketing Service (AMS) uses various forms of self-regulation in administering various statutes.

1. Marketing Agreements and Orders

Under the Agricultural Marketing Agreement Act of 1937,[430] the Secretary of Agriculture is authorized to facilitate or in some cases impose agreements between producers and handlers[431] of certain agricultural products, in order to regulate the quality and quantity of the products brought to market.[432] Two types of arrangements are authorized by the Act: a marketing agreement, essentially a voluntary agreement between the Secretary and producers,[433] and a marketing order, an agreement among handlers made binding on all handlers in a designated marketing area.[434] Although the two types are provided for separately and apply to different groups of commodities,[435] "[t]he terms ... often are used interchangeably, because a marketing agreement rarely is established without a marketing order or a marketing order established without an agreement."[436] It is the implementation of the marketing order which provides useful examples of self-regulation.[437]

---

[430] This statute has a difficult history, having been caught up in the constitutional struggles of early New Deal legislation. The agricultural marketing laws were first enacted in 1935, *see* ch. 641, 49 Stat. 750 (1935), as amendments to the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (1933) (codified principally at 7 USC §§601-612). The 1935 amendments were enacted to clarify the extent of the government's power in light of the Supreme Court's decision in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), holding the National Industrial Recovery Act unconstitutional as an improper delegation of legislative power. *See* S. REP. NO. 1011, 74th Cong., 1st Sess. 6 (1935); H. R. REP. NO. 1241, 74th Cong., 1st Sess. 8 (1935). The nondelegation doctrine is discussed in detail *supra* Part III.B.1. This portion of the Agricultural Adjustment Act as so amended was in turn reenacted and named the Agricultural Marketing Agreement Act by ch. 296, §1, 50 Stat. 246, 246 (1937) in order to establish that portion's continuing validity in light of the Supreme Court's decision in United States v. Butler, 297 U.S. 1, 74-75 (1936), holding unconstitutional certain taxation provisions of the Agricultural Adjustment Act. *See* S. REP. NO. 565, 75th Cong., 1st Sess. 2 (1937); H. R. REP. NO. 468, 75th Cong., 1st Sess. 2 (1937). The 1937 Act was subsequently held to be a valid delegation of legislative power. *See* United States v. Rock Royal Coop., Inc., 307 U.S. 533, 574-78 (1939).

[431] Handlers are "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof." 7 USC §608c(1).

[432] *See generally*, 1 JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, AGRICULTURAL LAW 284-88 (1982).

[433] *See* 7 USC §608; JUERGENSMEYER & WADLEY, *supra* note 432, at 284-88.

[434] *See* 7 USC §608c; JUERGENSMEYER & WADLEY, *supra* note 432, at 288, 293-95.

[435] Marketing agreements may be reached by producers and the Secretary with respect to "basic agricultural commodities," *see* 7 USC §608(2), defined in *id.* §611 as

> wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type or grade thereof.

Marketing orders, in contrast, may be imposed by the Secretary on distributors with respect to a convoluted listing of commodities, consisting primarily of fruits, vegetables, nuts and milk and milk products. *See id.* §608c(2).

There are two types of self-regulation involved in agricultural marketing orders. First, before any order may be effective, it must be under a marketing agreement among handlers of more than half of the volume of that commodity in the marketing area,[438] and must be approved by the producers in the marketing area.[439] Second, the implementation of the marketing order is left to local individuals or groups. The Secretary is required to provide for the selection of an "agency" and define its powers and duties, which include limited powers of self-regulation.[440] Pursuant to this authority, each of the 43 marketing orders relating to fruits, vegetables and nuts,[441] provides for the selection of an administrative committee including both producer and handler representatives.[442] And the general regulations applicable to each of the 40 milk marketing orders[443] provide for a market administrator, appointed by the Secretary, whose duties parallel those set forth in the statute.[444]

The first method of self-regulation, approval by producers and, in most instances, handlers as well, was intended to limit the discretion of the Secretary in restricting production and distribution of these commodities. The legislative history of the Act reveals significant concern of both producers and handlers with the unchecked use of government power to limit access to markets.[445] Although the scope of self-regulation is clearly more limited than other examples in this study, since it extends only to approval or disapproval of the proposed regulatory scheme as a whole package, the rationale for producer and handler approval follows one of the main purposes of self-regulation discussed above: widespread acceptance by the regulated entities.[446]

---

[436] JUERGENSMEYER & WADLEY, *supra* note 432, at 294. The Act requires that, for any marketing order to validly issue, there must have been proposed a marketing agreement regulating that commodity in the same manner and applicable to the same classes of activity. *See* 7 USC §608c(10).

[437] Because a marketing agreement, standing alone, is a voluntary consensual arrangement, *see supra note* 433 and accompanying text, it lacks the compulsion (apart from the law of contracts) which is an essential element of regulation. *See supra* Part I.A.

[438] *See* 7 USC §608c(8). A marketing order may be approved without such handler agreement if the Secretary determines that the handlers' refusal will impair the objectives of the Act, and if two-thirds by number and production volume of producers also approve the order. *See id.* §608c(9).

[439] With or without handler approval, the marketing order must be approved by two-thirds of the producers, measured both by number and by production or sale in the marketing area. *See id.*

[440] These "agencies" have only the powers to

> (i) To administer such order in accordance with its terms and provisions;
>
> (ii) To make rules and regulations to effectuate the terms and provisions of such order;
>
> (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and
>
> (iv) To recommend to the Secretary of Agriculture amendments to such order.

7 USC §608c(7)(C).

[441] *See* 7 CFR §§905.1 - 993.602.

[442] *See, e.g., id.* §§905.19 - 905.36 (establishing the Citrus Administrative Committee under the marketing order for oranges, grapefruit, tangelos and tangerines grown in Florida).

[443] *See id.* §§1001.1 - 1139.86. A "market administrator" is appointed by the Secretary for each milk marketing order. *See id.* §1000.3.

[444] *See* 7 CFR §1000.3(b).

The second method of self-regulation, delegation of operational activities to administrators and boards, is more classic audited self-regulation. The local committees or boards have the power to interpret and implement the act. Such delegation allows flexibility in administration of the over 80 local marketing orders. "It is clear that Congress contemplated widespread regional variations in the standards governing production of agricultural commodities."[447] Local administration by interested parties is a classic response to the need for flexibility.[448] In addition, in the case of marketing agreements other than for milk, the administration is vested in a committee including both producers and handlers, providing representation for both potentially antagonistic interests.[449]

---

[445] The Senate report on the bill notes that "[t]hese and other restrictive provisions are, in the opinion of the committee, adequately drawn to guard against any fear that the regulatory power is so broad as to subject its exercise to the risk of abuse." S. REP. NO. 1011, 74th Cong., 1st Sess. 3 (1935). In Congressional testimony, Chester Davis, Administrator of the Agricultural Adjustment Administration, noted that

> [t]he Agricultural Adjustment programs are founded upon the democratic principle of majority rule. ... . No one can say with any basis in fact that under the proposed amendment the Secretary of Agriculture could exercise arbitrary power over groups of farmers against their will. The requirement for consent of two-thirds of the producers affected insures that the wishes of the farmers will be carried out.

Amendments to the Agricultural Adjustment Act: Hearings Before the House Committee on Agriculture, 74th Cong., 1st Sess. 16 (1935) [hereinafter *1935 Hearings*]. In keeping with that "democratic principle," the ability of the Secretary to implement a marketing order notwithstanding the objection of a majority of the handlers, *see* 7 USC §608c(9), was the most strenuously opposed provision in the agricultural marketing law passed in 1935. *See 1935 hearings*, *supra*, at 11 (testimony of Administrator Davis that "this is the point on which I think most of the objections from distributors, handlers and processors of agricultural products will be based"). The limitation of marketing orders (except for milk orders), *see* 7 USC §608c(11)(B), to the smallest practicable area was also intended as a limit on the power of the regulators. *See infra* note 447 and accompanying text.

[446] *See supra* Part II.A.3.

[447] JUERGENSMEYER & WADLEY, *supra* note 432, at 313. The limitation to small areas was intended not only to be more efficient and flexible but to reduce the risk of abuse of regulatory power by the Secretary. *See* S. REP. NO. 1241, 74th Cong., 1st Sess. 3 (1935); H.R. REP. NO. 1011, 74th Cong., 1st Sess. 7 (1935).

[448] *See* Part II.A.1-2. From the outset of the agricultural marketing program, the extent of local variety was wide. "The marketing agreements ... which have been issued and entered into ... have contained a great variety of provisions in order to adopt each particular program to the peculiar problems and circumstances presented in a given area by a particular commodity." H.R. REP. NO. 1241, 74th Cong., 1st Sess. 7 (1935). In addition, "Congress has approved the use of such ... committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry's needs to make recommendations to the Secretary." Chiglades Farm, Ltd. v. Butz, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) (citing S. REP. NO. 566, 87th Cong., 1st Sess. 39 (1962)).

The use of local boards and administrators in the agricultural marketing statutes and regulations has followed requirements for effective audited self-regulation in other respects as well.[450] Although these agencies lack direct enforcement authority, they may recommend enforcement actions to the Secretary,[451] who retains independent investigation and enforcement authority.[452] Any aggrieved party may petition the Secretary for review of a marketing order,[453] and the Secretary retains the independent power to terminate a marketing order or any provision thereof.[454]

Beyond this facially-complete self-regulation, however, the government retains control over the local self-regulators to a degree not found in other programs. Although the statute permits the local boards to implement the marketing orders and adopt rules and regulations to do so,[455] in practice all regulations are "recommended" to the Secretary who then determines whether to begin rulemaking proceedings, and the ultimate regulations are those of the Secretary.[456] The Secretary even retains the ability to summarily reconstitute the membership of each local agency.[457] This retention of power does not make the local agencies superfluous, however. They apparently have some limited independent authority,[458] "and are intended to relieve the Secretary of the day-to-day burden of administering the marketing orders."[459] Retention of such complete direct regulatory authority where the statute might permit further delegation seems at odds with the principles of supervised self-regulation, but may be appropriate in the particular context of agricultural marketing orders. These regulations limit the type and often the quantity of a commodity which may be brought to market, and are often amended several times each growing season.[460] A regulatory scheme allowing the local agencies to exercise more authority subject to administrative review by an aggrieved party might create delays unacceptable in a market adjustment scheme where time is of the essence.[461]

---

[449] *See 1935 Hearings, supra* note 445, at 32-33 (testimony of Administrator Chester Davis, Agricultural Adjustment Administration, that "as a rule [the committees] represent the growers and the business interests equally with the odd member either chosen by the two groups ... or appointed by the Secretary of Agriculture"). Of the 44 existing marketing orders covering nonmilk commodities, only one provides majority representation to handlers, *see* 7 CFR §987.21 (California dates), and five others provide equal or nearly-equal representation to producers and handlers, *see id.* §§907.20 (California navel oranges), 908.20 (California valencia oranges), 925.20 (southeastern California grapes), 955.20 (Georgia Vidalia onions), 981.31 (California almonds). All other committees have producer majorities.

[450] This might be expected, since the legislation was drafted with the nondelegation doctrine in mind, *see supra note* 430, and Congress was arguably aware of the antitrust implications of marketing orders as well, since the Act provides an explicit antitrust exemption for marketing agreements. *See* 7 USC §608b(a).

[451] *See supra* note 440.

[452] *See* 7 USC §608a.

[453] *See* 7 USC §608c(15), 7 CFR §900.52.

[454] *See* 7 USC §608c(16).

[455] *See supra* note 440.

[456] In all but three of the 43 non-milk marketing orders currently on the books, the Secretary retains the authority to replace any agency member or alternate at any time and to summarily disapprove of any agency action, making it void except for acts previously done in compliance with it. *See* 7 CFR §§905.35, 906.53, 907.81, 908.81, 910.82, 911.62, 915.62, 916.62, 917.30, 918.85, 920.62, 921.62, 922.62, 923.62, 924.62, 925.62, 927.34, 928.62, 929.67, 931.62, 932.66, 945.81, 946.72, 947.82, 948.82, 950.82, 953.77, 955.81, 958.82, 959.82, 965.82, 966.82, 967.81, 971.82, 979.82, 984.83, 982.80, 985.65, 989.95, 993.83.

[457] *See id.*

In addition to these practical reasons for strict control of marketing orders by the Secretary, the strict control makes the local agency's actions more easily defended against legal challenges. Although the statute was drawn against the background of the nondelegation doctrine, the Secretary's total authority has been relied on in some instances as a defense against an attack on the local agencies as repositories of improperly-delegated authority,[462] and as a defense against antitrust challenges to otherwise unprotected conspiracies.[463]

2. Research and Promotion Boards

Federal statutes currently authorize research, consumer information and promotional activity on behalf of fifteen different commodities through research and promotion boards authorized to assess fees upon all handlers of that commodity.[464] The first such legislation, passed in 1954 relating to wool and mohair, generally authorized the Secretary to make agreements with private entities for advertising and sales promotion programs, with funding for such programs provided by a reduction in price support payments otherwise made to producers.[465] Subsequent statutes, however, have been considerably more detailed in the exact regulation to be undertaken by the Secretary, the amount of assessment to be paid by handlers to fund research and promotion programs, and each provides for a private board to administer those programs, under the Secretary's supervision.[466] These boards propose budgets and research and promotion programs which are effective upon the Secretary's approval. Although the scheme of statutes and regulations may seem similar to the marketing orders discussed above, more latitude is usually given to the decisions of the research and promotion boards, even though the dollar amounts involved are usually larger.[467]

---

[458] In some marketing orders, for example, the agency is given the authority to initially decide whether a producer is exempt from the order, *see, e.g.*, 7 CFR §§927.110 - .114, 948.132, or the authority to dispose of the quantities of a commodity initially withheld from the consumer market. *See, e.g., id.* §§981.66, 984.56, 985.57, 987.52, 989.67, 993.65.

[459] Farmers Alliance for Improved Regulation v. Madigan, Civ. No. 89-0959, 1991 WL 178117 at *5 (D.D.C. Aug. 30, 1991)

[460] *See, e.g. id.* at *4 ("This regulation takes place through week-by-week control over the volume of each type of fruit ... . The amount of fruit which can be shipped in a given week is set by the Secretary, acting with the advice of the relevant Administrative Committee.").

[461] Telephone interview with Tom Walsh, Assistant General Counsel, Marketing Division, Department of Agriculture (July 27, 1993).

[462] *See, e.g.*, Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 337 (9th Cir. 1990) (refusing to consider nondelegation doctrine challenge because "no such delegation has been established on the record"); Chiglades Farm Ltd. v. Butz, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) (no due process issues raised by operation of local committee because of substantial control of the committee by the Secretary); Whittenburg v. United States, 100 F.2d 520, 522-23 (5th Cir. 1939) (noting that total control by Secretary over the boards avoids delegation problem because the boards "have no actual power").

[463] *See, e.g., Wileman Bros.*, 909 F.2d at 334-36 (holding that conduct not approved by the Secretary may, because of that lack of approval, be outside the antitrust immunity granted in 7 USC §608b). The court did not agree with the defendants' allegation that the Secretary's failure to exercise his summary authority to disapprove any local agency action, *see supra* note 456, was equivalent to approval of that action. *See Wileman Bros.*, 909 F.2d at 337-38.

The use of supervised self-regulation in funding research and promotion is a case where the organized industry has created a self-funded program of promotion of its product. There are declining federal revenues available for direct support of these programs,[468] and each of these fifteen industries has demonstrated a broad consensus for such a program.[469] Each group of industry members would have particular expertise in the needed research, promotion and advertising required in each area. [470] Thus, the need for local expertise and control makes self-regulation an appropriate response. The degree of control retained by the Secretary has been sufficient to rebuff challenges to the research and promotion boards as unconstitutional delegations of legislative power.[471]

---

[464] *See* 7 USC §§1781-1787 (wool and mohair), 2101-2119 (cotton), 2611-2627 (potatoes), 2701-2718 (eggs), 2901-2918 (beef), 3401-3417 (wheat), 4301-4319 (flowers and plants), 4601-4612 (honey), 4801-4819 (pork), 4901-4916 (watermelons), 6001-6013 (pecans), 6101-6112 (mushrooms), 6201-6212 (limes), 6301-6311 (soybeans), 6401-6417 (milk). The wheat promotion program authorized by the above statute was terminated due to lack of industry interest in 1986. *See* Wheat and Wheat Foods Research and Nutrition Education; Termination Order, 51 Fed. Reg. 39,738 (1986). Although the earliest research and promotion statute, for wool and mohair, was passed in 1954, most are of comparatively recent origin. The last five programs listed (pecans, mushrooms, limes, soybeans and milk) were added as part of the Food, Agriculture, Conservation, and Trade Act of 1990. *See* P.L. No. 101-624 §§1905-1933, 1951-1976, 1999A-1999R, 104 Stat. 3359, 3838-65, 3870-904, 3914-26 (1990).

[465] *See* 7 USC §1787.

[466] *See id.* §§2106(a) (Cotton Board), 2617(a) (National Potato Promotion Board), 2707(a) (Egg Board), 2907(a) (Beef Board), 3405(a) (Wheat Industry Council), 4306(1) (Floraboard), 4606(c) (Honey Board), 4808(a) (National Pork Board), 4906(b) (National Watermelon Promotion Board), 6005(b) (Pecan Marketing Board), 6104(b) (Mushroom Council), 6204(b) (Lime Board), 6304(b) (United Soybean Board), 6407(b) (National [Milk] Processor Advertising and Promotion Board).

[467] Marketing orders typically do not involve collection of fees from handlers nor do they entrust the local boards with money to spend, apart from reimbursement for their administrative costs. Research and promotion orders, on the other hand, impose assessments on each handler and result in considerable sums placed at the disposal of the board responsible for research and promotion for that commodity. Telephone interview with Tom Walsh, Assistant General Counsel, Marketing Division, Department of Agriculture (July 26, 1993).

[468] *Id.* Although many of the assessments under earlier research and promotion programs were voluntary, permitting any handler to request a refund of the assessment, most of those provisions have now been removed entirely or removed subject to approval by a referendum of handlers. *See* 7 USC §§2110(b) (refunds terminated if approved by referendum), 2617(g) (providing for refunds, repealed by Pub. L. No. 101-624, §1940, 104 Stat. 3359, 3866 (1990)), 2712(b) (directing Secretary to amend orders to eliminate

V. A Model for the Successful Use of Audited Self-Regulation

Part IV analyzed the collected experience of audited self-regulation of seven agencies or departments in twelve programs spanning over seventy years.[472] Parts

---

refundability), 2907 (refunds terminated if approved by referendum), 4608(h) (refunds terminated unless defeated in referendum), 4813 (refunds terminated if approved by referendum), 6007(f) (same). Only the flowers and plants and watermelon orders retain the unconditional right to a refund of assessments. *See id.* §§4312, 4906(h). The removal of the refundability of assessments is partly industry response to the decline in federal funding of promotion programs. Walsh interview, *supra*. The most recent of these amendments eliminating refundability of assessments in the Egg Research and Consumer Information Act Amendments of 1988 was premised on the same need for funding.

> The egg industry realizes the need to provide sufficient funding to research and address the problems facing them today. A poll was conducted by the egg board of all commercial egg producers ... . Sixty-nine percent of the egg industry, representing seventy-nine percent of the total U.S. production, voted in favor of eliminating refunds of producer assessments.
>
> Borrowing from the success of similar orders that exist for the beef, dairy, and pork industries, the Committee believes that it is essential and in the public interest to authorize and enable the establishment of an orderly procedure for the development and financing (through adequate assessment) of an effective and continuous egg research and consumer information program. The hallmark ... must be the contribution by all commercial egg producers of their fair share.

H.R. REP. NO. 1,024, 100th Cong., 2d Sess. 3-4 (1988), *reprinted in* 1988 USCC.A.N. 3,819, 3,820-21.

[469] Not only is such broad support a de facto requirement for introduction of such legislation in Congress, but support is required to prevail in the referenda typically required in each act.

[470] One court described these programs as

> a "self-help" measure that would enable the ... industry to employ its own resources and devise its own strategies to increase ... sales, while simultaneously avoiding the intrusiveness of government regulation and the cost of government "handouts." ... . [This type of program] resembles a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing.

United States v. Frame, 885 F.2d 1119, 1122 (3d Cir. 1989), *cert. denied,* 493 U.S. 1094 (1990) (discussing specifically the Beef Promotion and Research Program, but noting that other programs are "identical in most respects," *id.* at 1122).

[471] *See id.* at 1128-29.

[472] The earliest regulatory program discussed in this part was regulation of futures exchanges in 1922. *See supra* note 214 and accompanying text.

II and III summarized the literature of audited self-regulation generally, suggesting some of its benefits and likely characteristics of an environment suitable to its use. This Part compares those theories and the results from the survey, concluding that there is substantial correlation between theory and practice, and extrapolates from this combination the necessary conditions for the successful use of audited self-regulation.

A. Advantages of Self-Regulation Demonstrated in the Survey

Part II of this study discussed various purported advantages of audited self-regulation. The benefits most often cited in adopting programs of audited self-regulation were a significant savings of federal staff compared to equivalent direct federal regulation, reliance on the expertise of the regulated entities, and the ability to avoid having government decisionmakers involved in areas which, for policy reasons, should remain insulated.[473] In some areas of audited self-regulation, powers were reclaimed by Congress or the agency from the self-regulatory organization when it was apparent that more direct supervision or regulation was needed.[474] Some of the programs were unable to succeed not because of problems related to the design of the audited self-regulation, but because of lack of support from the regulated entities.[475]

This experience suggests that the most likely advantages from the list of advantages of audited self-regulation postulated in Part II to actually appear in practice are superior technical expertise and flexibility. In some cases, incentives for compliance were lacking, and none of the programs documented a significant cost savings overall or even just for the federal government alone; in fact, in many programs any suggestions of anticipated cost savings were disclaimed.

B. Elements for Effective Self-Regulation Demonstrated in the Survey

Part III listed elements of the industry, agency and regulation which would be necessary for an effective program. The successful industries, it was predicted, would be made up of firms with the expertise and incentive to shoulder the regulatory load. These characteristics need not be displayed in a preexisting organized form, however. The survey shows that successful self-regulatory organizations can be established contemporaneously with the regulation; in almost half the programs, this was the case.[476] In the cases where programs were abandoned or modified, these elements of expertise and incentive were missing. The SEC's attempt to regulate investment advisers in this fashion foundered because the existing self-regulatory organizations were not trusted by the investment advisers themselves in their expertise. The CFTC's regulation of futures exchanges and HCFA's regulation of the peer review process each were substantially modified as the agencies discovered through experience that the self-regulatory organization in some instances lacked the incentive to do the job.

---

[473] Examples of such forbidden areas include the practice of medicine, instruction at colleges and universities, and production and distribution decisions of farmers.

[474] Examples of such reclamation of authority include futures market regulation and review of nonmedical (administration and finance) issues in eligibility of health care suppliers for reimbursement under Medicare.

[475] Lack of support from the regulated entities made it difficult for the SEC to pursue its programs of audited self-regulation for accountants and investment advisers.

The regulations, predicted the literature in Part III, would be the "social regulation" type, cutting across industry lines in health, safety and environmental areas. Interestingly, none of the programs of group self-regulation were of this type. Each was very industry-specific, yet self-regulation was advantageous for the same reason: it effectively deals with diversity. In these programs, the diversity is not in regulated entities scattered among different industries, but in regulated entities all in the same industry, but which nonetheless are to be treated differently. Each broker, physician, accountant, farmer or university president makes decisions individual to his client, patient, crop and market, or institution, at that time and in those circumstances.

The theories in Part III indicated that the best regulations for a self-regulatory program would be those which were sufficiently specific to limit discretion and output or result-oriented. The programs surveyed are a fairly even blend of both. In hospital accreditation, for example, the accreditors are moving to include outputs — quality of care — as well as inputs in determining hospital status. Accreditation in higher education is clearly output oriented; facilities and faculties are no doubt evaluated, but the important question is whether the institution is fulfilling the education mission it has adopted. Standards for securities and commodities brokers are a mixture of inputs — passing standard exams, capital invested in the business, and so forth — to results or outputs — rules against fraud and manipulation, for example. The qualities sought by looking at output standards are clarity and simplicity of measuring results. These apparently are equally available with input standards in the regulatory programs surveyed; it seems to be the clarity which is important. The two programs with arguably the most subjective standards, higher education accreditation and peer review of accountants, are also the programs with the most difficulty in implementing regulation. The higher education accreditation program is singular in its insulation from review, and the peer review program failed, at least with the SEC, to become mandatory at all.

---

[476] Self-regulatory organizations created contemporaneously with the regulation are the NASD, NFA, INPO, agricultural marketing order administrative committees, and agricultural research and promotion boards. Although INPO was created at the same time as the NRC's commandment to examine the operations and personnel policies of nuclear power plants more carefully, there is no suggestion that INPO was created specifically to fulfill that role in lieu of the NRC, although that was the result until litigation revealed that the NRC could not rely directly on INPO programs. *See supra* Part IV.C.

The agencies, predicted the literature in Part III, would be successful only if they possessed the necessary technical expertise in the subject and in auditing regulation by the self-regulatory organizations. The programs reviewed do not show any preexisting conditions which will demonstrate presence or lack of these abilities. They do show, however, that expertise can be developed in the agency as it can in the industry. Many of the programs of audited self-regulation, particularly where not developed in response to a manpower shortage, were implemented gradually,[477] allowing both sides the ability to develop the necessary skills. Thus, it appears that agency expertise is not a prerequisite; over the broad types of programs and agencies surveyed, each agency appeared capable of developing the necessary expertise. Self-regulatory programs which failed did not fail due to lack of ability on the part of the agency.

The process requirements discussed in Part III, applicable to programs of group self-regulation, were followed in their entirety by virtually every agency program. The major exception appears to be the four programs in health care and accreditation, which provide comparatively limited rights to appeal outside the self-regulatory organization to the government agency.

C. Necessary Conditions for Successful Audited Self-Regulation

The above conclusions can be restated in two groups of necessary conditions for audited self-regulation to be successful. First, the regulation must be effective, that is, it must realize the goals of the regulatory program; second, the regulation must be fair to regulated entities and the public alike.

1. Effectiveness

Audited self-regulation should be considered only where it might be effective. It should be considered by Congress in developing any program of regulation which requires diverse application to individual regulated entities, where there exists or can be created a self-regulatory organization with the expertise and motivation to implement the regulation, and where the federal agency through which the delegation is made has similar expertise and motivation to oversee that implementation, each in a manner consistent with the public interest. Similarly, a federal agency charged with implementing an existing program of regulation should consider proposing legislation to Congress to permit audited self-regulation where these conditions exist. Once such a program, agency and self-regulatory organization have been identified, Congress and the agency should together determine the scope of substantive delegation of responsibility to the self-regulatory organization. The agency's authority to delegate to the self-regulatory organization should be explicitly stated in the implementing statute.[478] The agency should also have independent enforcement authority over all regulated entities and independent rulemaking authority for the self-regulatory organization. Both the self-regulatory organization and the agency should be required in their rulemaking to consider the impact of the rule on competition.

---

[477] For example, the regulation of securities and commodities exchanges continued to develop, as evidenced by the continuous changes in both organic acts reviewed in Part IV.A.1. and 2.

Self-regulatory programs have failed where these conditions have not been met. The SEC, in proposing audited self-regulation of investment advisers, was unable to convince the investment adviser industry that there existed or could be created a self-regulatory organization responsive to their needs.[479] The Department of Agriculture was reluctant to grant expansive self-regulatory powers to the nation's commodity exchanges because of lack of confidence in those exchanges' commitment to the public interest.[480] The SEC, in proposing audited self-regulation for auditors of financial statements, was unable to impose upon the AICPA a sufficient regard for the need for effective agency oversight.[481] HCFA and the Department of Education have continually modified their self-regulatory programs in response to concerns that the self-regulatory organizations lacked concern for maintaining competition[482] or vigorous enforcement.[483]

An additional component of effectiveness, apart from the self-regulatory organization's oversight of the regulated entities and the agency's oversight of the self-regulatory organization, is congressional oversight of the agency to assure protection of the public interest. Such oversight is best assured if the program of audited self-regulation is conducted pursuant to explicit congressional authority. In almost all of the programs surveyed in Part IV, Congress specifically acted to create the self-regulatory program. The only exceptions are the SEC's proposed peer-review requirement for accountants and the peer-review program authorized by the FDIC. In neither instance did specific congressional legislation explicitly provide for delegation by the agency to a self-regulatory organization.[484] However, the FDIC's authority can be fairly implied from the statute,[485] and the SEC's program was never adopted. Significantly, the attempt by the NRC to rely on INPO standards was invalidated on the ground that the statute required direct agency regulation.[486] Thus, it is likely that explicit congressional authority is necessary in any event,[487] and is certainly a practical requirement. Congressional hearings and debates will provide legitimacy for the delegation to the agency or department and ultimately to the self-regulatory organization, and Congress in its authorization and subsequent reexamination has the power to assure that the agency and the self-regulatory organization continue to operate with the public interest paramount.

---

[478] An important part of a successful program of audited self-regulation is explicit statutory statements of the parameters of the program. *See infra* notes 484-487 and accompanying text.

[479] *See supra* note 263 and accompanying text.

[480] *See supra* note 227 and accompanying text.

[481] *See supra* notes 287-289 and accompanying text.

[482] *See, e.g.*, note 335 *supra* (anticompetitive effects of private accreditation of Medicare and Medicaid providers).

[483] *See, e.g.*, HCFA's continuing development of a generic accreditation rule for Medicare and Medicaid providers, *supra* text accompanying notes 327-330, and the amendment of the accreditation of clinical laboratories, *supra* note 347 and accompanying text.

2. Fairness

Audited self-regulation should be considered only where Congress is assured that it can be implemented fairly and in the public interest. In order to maintain standards of fairness consistent with the Constitution and the antitrust laws, the following process protections should be imposed. The self-regulatory organization should engage in its rulemaking on the record, with notice and opportunity for comment given to all affected groups to the extent possible, with particular emphasis on notice to nonmembers who might be adversely affected by the proposed rule, and responses to all significant comments required in the rulemaking record. In its adjudication or other enforcement activities, the self-regulatory organization should again provide notice and opportunity for a hearing to the respondent, and that hearing should be before an impartial decisionmaker who is required to place in the adjudication record his findings and the reasons therefor. The agency, of course, will be subject to all the requirements of the Administrative Procedure Act in its operations, and should in addition, be the first level of review for all rules and adjudications of the self-regulatory organization, with power to disapprove rules and to modify adjudications and sanctions.

---

[484] The SEC asserted that its authority to implement a peer-review system flowed from the requirement for "certified" financial statements under the federal securities laws, *see supra* note 271, and its general authority under the federal securities laws to define that term. *See Peer Review Release, supra* note 274, at 11,665. The FDIC asserted that its authority to require a peer-review system consistent with AICPA standards flowed from the statute itself, which required accountants to receive "a peer review that meets guidelines acceptable" to the FDIC. 12 USC §1831m(g)(3)(A)(ii); *see* Annual Independent Audits and Reporting Requirements, *supra* note 301, at 31,335.

[485] The language of the implementing statute, *see supra* note 484, suggests that the FDIC would be permitted if not encouraged to rely on externally-prepared peer-review guidelines. In its proposed rules, the FDIC noted that "any other accounting organizations that establish standards for peer review may submit details concerning their programs to the FDIC for consideration and possible approval." Annual Independent Audits and Reporting Requirements, *supra* note 305, at 42,521.

[486] *See supra* notes 423-425 and accompanying text.

[487] Many federal departments and agencies have been given general rulemaking authority. *See, e.g.* Securities Exchange Act §23(a)(1), 15 USC §78w(a)(1) ("The Commission ... shall ... have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title... ."); 12 USC §1819(a)(tenth) (the FDIC shall have the power "[t]o prescribe ... such rules and regulations as it may deem necessary to carry out the provisions of this chapter ... ."). However, these grants of authority were not relied on in any of the regulatory programs reviewed in this study.

Again, self-regulatory programs have failed where these conditions have not been met. Antitrust liability can result in such instances.[488] And the programs of private accreditation of health care delivery and higher education have been generally criticized for the lack of agency review of self-regulatory decisions.[489]

These conditions should provide assurance that audited self-regulation can result in *better* regulation in the public interest because the prerequisite elements exist and because the program will have the features found in existing successful programs. The ultimate responsibility to assure the public interest rests, of course, in the plenary authority of the agency and ultimately the Congress.

VI. Approaches to Encouraging Audited Self-Regulation

When self-regulation was initially adopted in the securities industry, it was expected that it would serve as a model for other similar ventures.[490] It is evident from the survey in Part IV that the use of this model has been somewhat limited. However, the survey also suggests that audited self-regulation can be a useful technique. It is frequently (but not always) successful, and has a fairly strong theoretical basis, in that the predicted advantages and elements seemed to be borne out by agency experience.

Apart from the securities and commodities industries and regulators, systems of audited self-regulation operate in the federal agencies largely ignorant of each other. Many other industries may be unaware of the technique or its potential application to their programs. To the extent that the benefits of audited self-regulation could be realized from any such properly managed program, as suggested in Part V, it is possible that a systematic government-wide analysis of the potential use of this regulatory technique could spread these benefits more widely. Not only could its use be considered in applications where the regulators are currently unaware of its potential, but different regulators could become aware of programs already in place at other agencies which might be useful models.[491] This Part discusses the options for implementing more comprehensive consideration of audited self-regulation across the federal government. It concludes that mandating regulatory analysis to include an evaluation of audited self-regulation will likely be counterproductive. However, informal recommendations will probably serve to heighten awareness of the technique in interested agencies, which may be more likely to give audited self-regulation genuine consideration when it is in their best interests.

---

[488] *See supra* Part III.C.1.

[489] *See supra* notes 369 (limited review of denials of payment by Medicare PROs) & 412-413 and accompanying text (lack of direct authority over higher education accreditation agencies).

[490] *See Hed-Hofmann,* supra note 48, at 187-88; Smythe, *supra* note 145, at 478-79.

A. The Futility of Mandatory Regulatory Analysis

In some agencies, such as the SEC or CFTC, the widespread current use of audited self-regulation has probably already served to sensitize the policymakers to its potential use. In other agencies, such as HCFA, the burdens of direct regulation have required them to consider alternatives generally, of which audited self-regulation has proved a promising one. Elsewhere, however, consideration of the technique appears to be fortuitous. If audited self-regulation is to be given systematic consideration by agencies, it must be formally or informally added as a step in their rulemaking processes.

An explicit requirement that this option be considered in each regulatory analysis would dramatically increase the awareness across agencies of its potential benefits.[492] Whether it would do much beyond that, however, is doubtful. What is needed to make regulatory analysis successful is a genuine interest in improving the agency's efficiency.[493] Mandating the procedures does not necessarily create the required motivation,[494] especially since the procedures are and probably must be insulated from outside review.[495] Judicial review is not a likely result. Congress was unwilling to provide for judicial review in the Regulatory Flexibility Act,[496] and there is nothing inherently revolutionary about audited self-regulation, despite its advantages, to suggest that Congress would treat it differently. Executive review provides a limited enforcement mechanism,[497] but again it cannot internalize the genuineness with which agencies approach regulatory analysis. Other measures could be more effective but are simply not realistic.[498]

---

[491] *See supra* note 4.

[492] This is the theory behind recent regulatory reforms requiring measuring of costs and benefits and evaluation of alternative forms of regulation, *see, e.g.*, Exec. Order No. 12,866, §1(b), 58 Fed. Reg. 51,735, 51,735-36 (1993), or the impact on small entities, *see, e.g.*, Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1165 (1980) (codified at 5 USC §§601-612). *See* Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 229 (noting the "optimistic assumption" of the Regulatory Flexibility Act that "highlighting the problems of small business and offering suggestions will allow agencies to solve problems they have largely created"); Jeffrey L. Davis, *Regulatory Reform and Congressional Control of Regulation*, 17 NEW ENG. L. REV. 1199, 1220 (1982) (the purpose of regulatory analysis such as cost-benefit evaluation "is essentially to sensitize [agencies] to the costs imposed by their regulation by forcing them to give explicit consideration to such costs").

[493] *See Agency Procedures for Performing Regulatory Analysis of Rules*, Administrative Conference of the United States, Recommendation No. 85-2, 1 CFR §305.85-2, Introduction [hereinafter ACUS Recommendation] (concluding that "regulatory analysis can be a useful device in rulemaking if it is taken seriously by upper level agency decisionmakers;" BARAM, *supra* note 19, at 153 ("although Congress can and should provide the basic structural features and require compliance by all agencies, the fully detailed structuring of discretion (the criteria to be used for choosing among alternatives to deal with very specific health or safety problems) can come only from the agency"); NOLL & OWEN, *supra* note 82, at 159-60 (summarizing "the collective and steady effort of agencies to improve their capabilities for internal analysis and to use internal studies and general inquiries for examining important policy issues").

---

[494] In evaluating mandatory analysis, one government policy analyst concludes:

> If the ... regulatory agency ... has a history of insensitivity to regulatory costs in general ... it is doubtful that an analysis extracted only by force of law will reflect a great deal of creativity in recognizing and responding to such concerns. It is nearly always possible to marshal a strong contingent of arguments in opposition to alternatives, if the agency is inclined to do so. If, on the other hand, the agency has demonstrated the desired sensitivity and has attempted to fashion reasonable accommodations, it is equally doubtful that a mandatory analysis will have any substantive effect on the character of its regulations.

Davis, *supra* note 492, at 1220. This is not to suggest, however, that there is not an abundance of such "sensitive" agencies.

> Although many Regulatory Impact Assessments [required under Executive Order 12,291, 3 CFR 127 (1982), the predecessor to Executive Order 12,866, *see supra* note 492] were no doubt post hoc rationalizations for decisions reached on other grounds, my examination of the process over a two-year period has convinced me that the requirement has resulted in many genuine efforts to obtain relevant information, analyze that information, probe alternatives, and reach sound regulatory decisions. Whether the effort is worth its substantial costs, however, is open to debate.

Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 267-68 (1986).

[495] Lack of effective judicial review seriously limits the impact of the Regulatory Flexibility Act. *See* Verkuil, *supra* note 492, at 271 (concluding the Act will be effective if the Small Business Administration's Office of Advocacy can expand its limited ability to "alert the courts"); Doris S. Freedman et al., *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439, 463 (1989) (concluding that the ultimate effectiveness of the Act is "questionable" given the courts' preclusion of review). Executive Order 12,866, *supra*, also explicitly precludes judicial review. *See id.* §10, 58 Fed. Reg. at 51,744.

[496] *See* 5 USC §611. *See also supra* note 495. The National Performance Review, however, recommends providing for judicial review. *See* GORE, *supra* note 4, at 148 (Recommendation SBA01).

[497] Under Executive Order 12,866, *supra*, for example, the Office of Management and Budget is authorized to require a rule's review under the Order, and to require an agency to reconsider its rule prior to effectiveness. *See id.* at §6(b), 58 Fed. Reg. at 51,742-43. Executive orders are, of course, binding only on the executive agencies. And even then, the nature of the organization suggests that review will be less than searching.

> The line agency ... may have far more facts at its disposal and be more familiar with them. Does the OMB possess the necessary manpower and expertise to deal with a one hundred page proposed OSHA regulation on carcinogens in the workplace? Can it do more than scratch the surface? Perhaps the OMB can deal with regulations that are on their face wasteful, ineffective, or counterproductive, but typically, the advantages and disadvantages of proposals are known only after detailed study of the substantive area at issue.

Legislative reforms have a limited potential to spur regulatory reform. Experience with the Regulatory Flexibility Act suggest that mandated procedures will have little if any substantive impact. Mandated program changes would be workable only on a case-by-case basis.[499] While effective, these efforts would necessarily be limited by Congressional resources to a few of the most important industries.[500]

B. Encouraging Self-Interested Regulation

Effective regulatory reform requires self-motivation from the agencies. It will thus be the responsibility of the agencies to lay the groundwork for audited self-regulation independently, within the bounds of existing legislation. When the time comes for Congressional action,[501] the agency will be ready with reforms needed to make the program more effective. Until such time, however, audited self-regulation will be implemented if the agencies are self-motivated to do so. In the final analysis, audited self-regulation lives by its own creed. It is most effective when it is implemented by the agencies closest to each situation, with the expertise and ability to make changes which will work because they are in the agency's and the regulated entities' self-interest.

Most analysts of regulatory policy seem resigned to conclude that an agency's self-interest requires its perpetuation.[502] Even if true, this is not a barrier to effective use of audited self-regulation. Regulatory reform of this type

---

Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 9 (1984) (discussing predecessor to Executive Order 12,866).

[498] *See, e.g.*, Davis, *supra* note 492, at 1227 n.112 (requiring agencies to estimate compliance costs in a regulatory budget and permitting regulated entities to pay "noncompliance fees" to avoid the regulation in question) & 1229 ("generic budget cuts for each agency, permitting the agency to select the regulations to be curtailed). Davis concludes that without Congressional self-restraint on delegation, there is little likelihood of effective regulatory reform. *See id.* at 1233.

[499] It is difficult to hypothesize any form of *mandatory* legislation applicable across agencies to implement a particular regulatory program. To be a valid delegation of power, it would of course need to be accompanied with sufficient standards for use. *See supra* Part III.B.1. Such general standards from Congress, applicable to all agencies, are no more likely to be effective than the general command-and-control standards from agencies are across all industries. *See supra* Part II.A.5.

[500] Judge Breyer contends that there are several regulatory programs which are candidates for individual Congressional attention. Although that is hard and long work, consisting of a significant initial information-gathering effort by Congress, creating political visibility and building a coalition dedicated to reform, he concludes it is the only direction to meaningful regulatory reform. Generic or omnibus proposals, he concludes, are simply too weak to generate an impetus for reform. Breyer, *supra* note 497, at 23; Stephen Breyer, *Two Models of Regulatory Reform*, 34 S.C. L. REV. 629, 646-47 (1983).

[501] The Congressional process envisioned by Breyer, *supra* note 497, at 23, "takes time."

[502] *See* MITNICK, *supra* note 1, at 421.

is not "deregulation,"[503] and does not necessarily mean a reduced role for the agency,[504] but only a more efficient one.

And the agencies' self-interest can be encouraged. A recommendation of the Administrative Conference would make the utility of audited self-regulation more widely known to the policy analysts within each agency.[505] The National Performance Review recommends comprehensive analysis of alternative regulatory program designs, to be available to each agency.[506] Thus, the principles are more likely to be incorporated into each agency's regulatory analysis.[507] The success of this approach depends extensively on the strength of the regulatory analysis by each individual agency. Recommendations of the Administrative Conference, or even elevation of those statements to precatory administrative orders or regulations will be valuable if they serve to educate, but we cannot and should not expect more of them.

Other external factors may motivate agencies to consider audited self-regulation. The resources of federal government are not infinite, nor is the capability of American business to absorb the costs of regulations not borne abroad.[508] These limits have been recognized, for example, in the work of the CFTC and Congress to create the NFA.[509] It is likely that agencies which might be predisposed to considering audited self-regulation are unwilling "to generate SROs from scratch,"[510] and to face an extended trial-and-error experience as did the SEC or CFTC. The model of audited self-regulation described in this article, and distilled to its essential attributes in Part V, draws in large part on the experience of the agencies, the regulated entities, the courts, and scores of distinguished observers over the past 60 years. This experience can be drawn upon without being repeated.[511] Agencies can be exhorted to consider audited self-regulation; many will likely be willing to experiment. In the meantime, the tools can be readied for agencies ready to undertake the task; the seeds can be planted by proclamation, education and informal "sensitizing," and perhaps sprout in genuine interest by an agency which recognizes when audited self-regulation may serve everyone's self-interest. We cannot command that they do so; but we can supply the methods and await the motivation. This is in the final analysis the most effective and perhaps only way to achieve lasting results.

---

[503] *See supra* notes 37-39 and accompanying text.

[504] Indeed, the existence of any cost savings from self-regulation, though regularly invoked as an advantage, is rarely proved; *see supra* Part II.A.4. Regulatory reform simply means regulating differently — more efficiently — and not necessarily less, although this may be one result. *See* NOLL & OWEN, *supra* note 82, at 159-60.

[505] *See* Marshall J. Breger, et al., *Providing Economic Incentives in Environmental Regulation*, 8 YALE J. ON REG. 463, 494-95 (1991) (Administrative Conference Chairman Breger noting that "[EPA Assistant Administrator and General Counsel E. Donald] Elliot's suggestion that the Administrative Conference study how to create regulatory systems that are more sensitive to market incentives and performance standards is a useful reminder. We have done work in this area in the past ... . We should be doing more.").

[506] *See* GORE, *supra* note 4, at 117-18.

[507] See ACUS Recommendation, *supra* note 493. Recommendation No. 1 indicates that agencies should incorporate a broad range of options at the very beginning of information-gathering and analysis in respect of a rule.

[508] *See* Stewart, *supra* note 58, 355-56 (citing these "external constraints" which will ultimately require less cumbersome and more effective regulation); Dana A. Rasmussen, *Enforcement in the U.S. Environmental Protection Agency: Balancing the Carrots and the Sticks*, 22 ENVTL. L. 333, 337 (1991) ("The reality of finite resources reminds us of our spending for environmental protection").

[509] *See supra* Part IV.A.2.

[510] Miller, *supra* note 83, at 864.

---

[511] The motivations of one researcher examining only the EPA's emissions trading program can be extended to any program of regulation.

> As anyone who has tried it knows, regulatory reform is easier said than done. Reform concepts which appear so disarmingly simple in the abstract world of theory turn out to be distressingly complex when applied. Regulations which from a distance seem so inherently unsupportable, upon closer inspection are discovered to have significant bases of support among various special interest groups. Since the status quo has so much inertia, many promising ideas end up strewn along the wayside. Survivors are few and far between.
>
> What is the price of survivorship? How much of the original idea has to be sacrificed as the cost of gaining a place in the sun? One way to begin to answer these questions is to examine closely those reform packages ... that have survived.

TIETENBERG, *supra* note 31, at xi.

Annotated Bibliography

Abramson, Harold L. *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165 (1989). Divides "fifth branch" activities into three types, and suggests that explicit recognition of the differences among them would yield more principled delegation doctrine decisions. Most relevant is the discussion of the asserted purposes of private regulation and the general history of court decisions.

Ackerman , Bruce A., and Richard B. Stewart. *Reforming Environmental Law,* 37 STAN. L. REV. 1333 (1985). A response to Lattin's article criticizing the authors' theories of regulatory reform, contending that Lattin has overstated the authors' proposals for regulatory reform, and reiterating the costs and inefficiencies of "command and control" regulation.

Bacow , Lawrence S. *Private Bargaining and Public Regulation,* in SOCIAL REGULATION: STRATEGIES FOR REFORM 201-20 (Eugene Bardach & Robert A. Kagan eds. 1982). Discusses hypothetical program where union stewards replace OSHA inspectors; relates the advantages of expertise and cost-savings, and how government might encourage such a result, presaging the VPP program later instituted by OSHA.

BARAM, MICHAEL S. ALTERNATIVES TO REGULATION: MANAGING RISKS TO HEALTH, SAFETY AND THE ENVIRONMENT (1982). Discusses use of alternative methods in this area. Especially relevant are Chapter 3 (Private, Voluntary Self-Regulation), discussing how an agency might best use "consensus" standards, and Chapter 6 (Implementation of Alternatives), looking at possible generic legislation authorizing/commanding agencies to consider alternative methods in rulemaking.

Bardach, Eugene. *Self-Regulation and Regulatory Paperwork,* in SOCIAL REGULATION: STRATEGIES FOR REFORM 315-40 (Eugene Bardach & Robert A. Kagan eds. 1982). Provides rationales of information collection by the government, in particular discusses the potential for self-certification as a regulatory technique, not merely a reporting mechanism..

BARDACH, EUGENE, & ROBERT A. KAGAN. GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982). Ch. 7, "Indirect Regulation," considers on a theoretical basis the costs and benefits of self-regulation, and how it can be effectively used.

---

* denotes previous Administrative Conference projects

Berk, Gerald P. *Approaches to the History of Regulation*, in Regulation in Perspective (Thomas K. McCraw ed. 1981). End paper synthesizing this collection of essays; particularly helpful is the "four functions of regulation." Most relevant here are "policing," which can be done with self-regulation, and standard-setting, which will occur spontaneously but which can be facilitated by regulators.

Blumrosen, Alfred W. *Six Conditions for Meaningful Self-Regulation*, 69 A.B.A. J. 1264 (1983). Those conditions are: (1) standards be established by law; (2) a vigorous government enforcement program; (3) measurable/objective standards; (4) possibility of residual individual liability; (5) incentives for self-regulation — administrative and interpretive, such as plan approval and periodic reporting; (6) sufficient and organized public concern.

Breger, Marshall J., et al. *Providing Economic Incentives in Environmental Regulation*, 8 Yale J. on Reg. 463 (1991). Discusses major issues in broader application of incentive-based environmental regulation: political problems ("license to pollute"), requisite industry characteristics, geographic scope of problem/market, and setting baseline values for trading.

Breyer, Stephen. *Reforming Regulation*, 59 Tul. L. Rev. 4 (1984). Stephen Breyer, *Two Models of Regulatory Reform*, 34 S.C. L. Rev. 629 (1983). Analyzes "generic" reforms, likely to have little impact, and regulation-specific Congressional reforms based on intensive investigation and political consensus-building, which are more likely to be effective.

Cary, William L. Politics and the Regulatory Agencies (1967). Lectures delivered at Michigan, dealing mostly with his experiences with Congress and the White House as SEC chairman, noting the similarity of the SEC/self-regulatory organization relationship to the SEC's relationship with Congress as supervised oversight.

Cohen, Jeffrey R., & Laurie P. Pant. *Beyond Bean Counting: Establishing High Ethical Standards in the Public Accounting Profession*, J. of Bus. Ethics, Jan. 1988, at 55. Discussion of voluntary self-regulation undertaken by the American Institute of Certified Public Accountants (AICPA) and recent calls for government supervision of this self-regulation.

Commodity Futures Trading Commission, National Futures Association: Report to Congress under Section 237 of the Futures Trading Act of 1982 (7 U.S.C. §16a) (1985). Report by CFTC on the initial operation of the NFA, discussing goals and achievement, cost savings to the CFTC, and comparisons of the NFA to other CFTC regulation and a contrast between the NFA and the NASD.

Costle, Douglas M. *Environmental Regulation and Regulatory Reform*, 57 WASH. L. REV. 409 (1982). Costle, former EPA Administrator, criticizes the Reagan administration's regulatory "relief" as not true regulatory reform, which could be more successful. He gives brief examples of "traditional" and "social" regulation, showing how regulatory reform incorporating economic incentives without totally relying on the private sector can be more efficient. One example is the use of "bubbles."

Davis, Jeffry L. *Regulatory Reform and Congressional Control of Regulation*, 17 NEW ENG. L. REV. 1199 (1982). Reviews Regulatory Flexibility Act and Paperwork Reduction Act and related proposed legislation. Concludes that regulatory analysis is inherently flawed because it is only as good as an agency's dedication to regulatory reform, which cannot be legislated; the real problem is Congress' over-delegation of insoluble problems.

DAVIS, KENNETH C. 1 ADMINISTRATIVE LAW TREATISE 59-223 (2d ed. 1978). Ch. 2, discussing philosophical foundations, and Ch. 3, devoted to the delegation doctrine.

DAVIS, KENNETH C. DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969). A jurisprudential treatment of the use of discretion by all administrators from federal agency to local police, and how it might be effectively reviewed and limited. Also includes a useful discussion of the nondelegation doctrine and the reliance on "rules of law" to curb discretion.

Dennis, Jeanne M. Comment, *Smoke for Sale: Paradoxes and Problems of the Emissions Trading Program of the Clean Air Act Amendments of 1990*, 40 UCLA L. REV. 1101 (1993). Analyzes the acid rain emissions trading program and its probable effect on the electric utility industry, suggesting some changes paralleling those made by the South Coast Air Quality Management District.

Dilk, Andrew J. *Negligence of Federal Aviation Administration Delegatees Under the Federal Tort Claims Act*, 42 J. AIR L. & COMM. 575 (1976). Lists types of "representatives" provided by law & FAA regulation: medical examiners, pilot examiners, technical personnel examiners, manufacturers' designated representatives. Also lists other "quasi-representatives" who serve the same functions but are not so anointed by law. Dilk then focuses on Federal Tort Claims Act cases specifically involving FAA and refers to some involving other agencies.

Dudek, Daniel J. & John Palmisano. *Emissions Trading: Why is this Thoroughbred Hobbled?*, 13 COLUM. J. ENVTL. L. 217 (1988). Comprehensive coverage of all six types of emissions trading, their limited popularity, and how they can be improved.

Finkin, Matthew W. *Reforming the Federal Relationship to Educational Accreditation*, 57 N. C. L. REV. 379 (1979). An update and expansion of the author's 1973 article. A review of each major law requiring listing of accrediting agencies, and a review of the substantive and procedural infirmities of the system. Suggested reforms are a residual government agency which directly accredits where others will not, or an independent prosecutorial branch to "decertify" a school upon investigation or complaint, accreditation notwithstanding.

Finkin, Matthew W. *Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate*, 2 J. L. & EDUC. 339 (1973). Discusses in detail congressional intent and motives in each major piece of education-related legislation from 1944 through 1972, and the limited authority of the government to regulate educational accrediting agencies.

FRANKEL, TAMAR. 1 THE REGULATION OF MONEY MANAGERS (1978 & Supp. 1992). Authoritative treatise on investment companies and investment advisers, with brief discussions of investment adviser self-regulation efforts.

Freedman, Doris S., et al. *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439 (1989). The authors are Small Business Administration staff charged with "enforcement" of the Regulatory Flexibility Act, concluding that the lack of judicial review has left the Act only with the ability to permit (but not really to require) agencies to recognize the impact of regulation on small business.

FREEDMAN, JAMES O. CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978). Most relevant is the analysis of public perception of administrative performance and the public disillusion with regulation by experts, a discussion of the standards for delegation to private parties or groups, which he believes should be (1) disinterestedness and (2) expertise, and a discussion of organic statutes and missions in defining the success of the SEC and the failure of the FTC.

Fritschler, A. Lee. *The Changing Face of Government Regulation*, in FEDERAL ADMINISTRATIVE AGENCIES: ESSAYS ON POWER AND POLITICS 38-51 (Howard Ball ed. 1984). Pursues the differences between the older economic regulation and the newer social or functional regulation. The former was adjudicatory; the latter rulemaking. The former (either originally or later) received support from business and industry, the latter, having their geneses in the "single-issue politics" of the 1960s, were not supported by the regulated. The former had limited costs and likely clear benefits, the latter have widespread costs with benefits difficult to measure, and result because of their cross-jurisdictional reach in overlap and accumulation of regulatory impacts. Concludes by endorsing generalized methods of coordination and reform: streamline, rely on market forces.

Graham, John D. *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100. Notes the inefficient structure of §112, in classic "command-and-control" fashion. Congress mandated decisions without criteria and in areas where there simply are no answers, imposed unreasonable deadlines for compliance, and permitted no cost-benefit valuation.

Gray, Wayne B., & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement,* 27 LAW & SOC'Y REV. 177 (1993). Reviews a large base of OSHA enforcement actions and injuries at almost 7000 manufacturing plants over six years, using unique techniques intended to eliminate biases in former studies, and finding a small but significant effect of OSHA inspection on the injury rate.

Grumbly, Thomas P. *Self-Regulation: Private Vice and Public Virtue Revisited*, in SOCIAL REGULATION: STRATEGIES FOR REFORM 93-118 (Eugene Bardach & Robert A. Kagan eds. 1982). Analyzes voluntary self-regulation in the context of FSIS' quality control program. Concludes with recommendations for implementation of similar programs, including broad consensus on goals, agency expertise, availability of knowledge base in the industry.

Hahn, Robert W., and Gordon L. Hester. *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989). Analyzes four emissions trading programs: offsets, banking, bubbles and netting. Of the four, netting is by far the most widely used. Broader use of these methods would be valuable, the authors contend. Fixing the measurement and transferability of these "rights" would help, but there has been significant pressure on EPA from environmentalists to not refer to these things as "pollution rights" or to expand their marketability.

Hahn, Robert W., & Gordon L. Hester. *Marketable Permits: Lessons for Theory and Practice*, 16 ECOLOGY L.Q. 361 (1989). Similar to the Yale Journal on Regulation paper. Part IV gives some insights into political issues in the acceptance and further use of market-based incentives.

Hahn, Robert W., and Roger G. Noll, *Designing a Market for Tradable Emissions Permits*, in REFORM OF ENVIRONMENTAL REGULATION 119-46 (Wesley A. Magat ed. 1982).

* Hamilton, Robert W. *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978). A study of voluntary standards in safety and health areas. Focuses on history, evaluation, case studies (OSHA, CPSC, NRC, FDA, HUD, USCG), and proposed unitary standards.

Havighurst, Clark C., & James F. Blumstein, *Coping With Quality/Cost Trade-offs in Medical Care: The Role of PSROs,* 70 NW. U. L. REV. 6, (1975). Reviews the microeconomics of health care decisions coupled with federal government efforts at cost control. The authors conclude that more competition and a restoration of consumer choice in the area would help control costs, instead of the observed trend (in the then-current PSRO program) to more heavily regulate.

HAWKINS, KEITH, & JOHN M. THOMAS, EDS., MAKING REGULATORY POLICY (1989). Collection of articles directed mostly to agency rule-making. Relevant articles include: Colin S. Diver, *Regulatory Precision,* discussing advantages/disadvantages of specific\precise rules with three case studies (SEC Rule 144, DOT hazardous materials transportation guidelines, FCC broadcast licensing); and Keith Hawkins and John M. Thomas, *Rule Making and Discretion: Implications for Designing a Regulatory Policy*, mostly discussing discretion in enforcement.

Hawley, Ellis. *Three Facets of Hooverian Associationalism: Lumber, Aviation and Movies, 1921-30,* in REGULATION IN PERSPECTIVE (Thomas K. McCraw ed. 1981). The theory of supervised self-regulation has its roots in the efforts of Secretary of Commerce Herbert Hoover during this period. Seeking to build on the successes of organized private industry during the War, Hoover relied on what Hawley calls "corporatism," with the idea "that the resources for meeting new regulatory needs were to be found mostly in the private rather than the public sector, and would act accordingly." The push was on self-regulation, an idea which carried over even to Roosevelt's NRA.

Hed-Hofmann, Tamar. *The Maloney Act Experiment*, 6 B.C. INDUS. & COM. L. REV. 187 (1965). Review of the performance of the NASD since 1938: purported advantages of self-regulation in this area, analysis of where it has worked and failed.

HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, SECURITIES INDUSTRY STUDY, H.R. Rep. No. 1519, 92d Cong., 2d Sess. 79-99, 155-68 (1972). These two chapters of the Securities Industry Study discuss "cooperative regulation" and antitrust liability.

Husband, Warren H. Comment, *New Approaches and New Polluters: The Practical Impact of the Clean Air Act Amendments of 1990*, 19 FLA. ST. U. L. REV. 861 (1991). General review of the 1990 Act's provisions.

Jaffe, Louis L. *Lawmaking by Private Groups,* 51 HARV. L. REV. 201 (1937). Critical of the then-recent *Carter Coal* decision, Jaffe points out the myriad ways in which private decisions are given public force independent of some "standard" by which they are reviewed. Though Jaffe notes that we rely much on the abilities of professionals or groups with opposing economic interests bargaining at arms' length to produce proper results, this may be enough.

Jennings, Richard W. *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission,* 29 LAW & CONTEMP. PROBS. 663 (1964). Jennings examines the historical development of self-regulation and evaluates its performance in light of the assumed virtues of self-regulation (lower cost, increased flexibility and legitimacy, for example). He suggests several reforms paralleling those ultimately adopted in the Securities Acts Amendments of 1975.

Joskow, Paul L., & Roger C. Noll, *Regulation in Theory and Practice: An Overview* in STUDIES IN PUBLIC REGULATION (Gary Fromm ed. 1981). A comprehensive review of a research agenda on the economics of administrative regulation.

Jost, Timothy S. *Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations*, 50 OHIO ST. L.J. 1 (1989). Excellent summary of the development of the PRO program and more particularly of the problems in administration, both from a practical standpoint and from an administrative law standpoint. Makes recommendations based on policies and goals of the program as well as those of administrative law. Based on interviews of numerous participants in the system in addition to traditional research.

Jost, Timothy S. *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 B.C. L. REV. 835 (1983). Excellent summary of the development of the JCAHO and its current role, and critiques of its operation, primarily from an antitrust perspective.

1 JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, AGRICULTURAL LAW §§10.1 - 12.12 (1982 & Supp. 1985). A leading treatise discussing the laws and regulations of agricultural marketing and promotion.

KAPLIN, WILLIAM A. THE LAW OF HIGHER EDUCATION (2d ed. 1985). Chapter 8, pp. 561-80 discusses accrediting agencies, applicable cases in administrative, antitrust and defamation law, and includes an annotated bibliography.

Karmel, Roberta S. *Securities Industry Self-Regulation — Tested by the Crash,* 45 WASH. & LEE L. REV. 1297 (1988). Discusses the reforms implemented by the securities markets after the 1987 market crash, preceded by an extensive historical overview of securities market self-regulation and the benefits and disadvantages of self-regulation generally.

Krent, Harold J. *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government,* 85 NW. U. L. REV. 62 (1990). Krent supplies separation-of-powers analysis to fill the void left by lack of challenge to the remarkable variation of delegation outside the government made by Congress in recent legislation, providing useful examples and analysis of such delegation. He suggests that such legislation can survive challenge if at all only by relying on functional equivalents such as self-interest to supply the constitutional checks and balances otherwise provided by the President's appointment and removal powers in delegations within the executive branch.

Latin, Howard. *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reforms,* 37 STAN. L. REV. 1267 (1985). A broad criticism of regulatory reform as largely theoretical and relying on unrealistic assumptions. The theory of "second best," argues Latin, suggests continued reliance on setting specific "command and control" standards.

Lawrence, David M. *Private Exercise of Governmental Power,* 61 IND. L.J. 647 (1986). Conceding that federal government delegation is universally approved, Lawrence examines delegations under state law. Nonetheless, he provides a good description of the conventional benefits of delegation to private groups generally, and the discussion of limits of that power, though in a state law context, points out many of the conventional disadvantages.

Levin, Harvey J. *The Limits of Self-Regulation,* 67 COLUM. L. REV. 603 (1967). Discussion of creation of industry codes and standards reviewed from an antitrust perspective. He provides an introductory discussion of the motivations for self-regulation, as well as three case studies: motor vehicle safety standards, cigarette advertising and broadcast programming.

Levin, Michael H. *Getting There: Implementing the "Bubble" Policy*, in SOCIAL REGULATION: STRATEGIES FOR REFORM 59-92 (Eugene Bardach & Robert A. Kagan eds. 1982). Case study of the development and implementation of bubble policies at EPA, focusing on how to align the industry and, more importantly, the agency, with the new approach, concluding with requirements for implementing novel regulatory techniques effectively.

Liebmann, George W. *Delegation to Private Parties in American Constitutional Law,* 50 IND. L.J. 650 (1975). Critical of the incoherence of current formulations of the nondelegation doctrine, he discusses specific applications, including the NASD and more generally delegation of "judicial" powers to existing private groups. He concludes most can be upheld if they provide for meaningful review by a government body (court, agency, legislature).

Lipton, David A. *The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for Securities Markets,* 16 U.C. DAVIS L. REV. 527 (1983). A useful analysis of division of responsibility within an industry already governed in large part by supervised self-regulation. Lipton provides guidelines designed to maximize utility and efficiency in allocation of regulatory responsibility between the agency (use of its direct or indirect control) and the self-regulatory organizations (SROs). Guidelines include: (1) decisions requiring technical expertise should be resolved by the institution with the greatest expertise; (2) where uniformity is required, the SEC should administer the decisions of the SROs; (3) conflicts of interest among SROs should be resolved by the SEC. Lipton notes in conclusion that similar criteria could be developed to resolve whether an industry should regulate itself at all.

LIPTON, DAVID A. BROKER-DEALER REGULATION (1988 & Supp.). A comprehensive treatise, with coverage in Ch. 1 of the historical development of regulation (and self-regulation) of securities broker-dealers.

LIROFF, RICHARD A. REFORMING AIR POLLUTION REGULATION (1986). A comprehensive study focusing specifically on the EPA's "bubble" regulations and the development of the comprehensive emissions reduction credit program.

LIROFF, RICHARD A. AIR POLLUTION OFFSETS: TRADING, SELLING, AND BANKING (1980). A companion to Liroff's 1986 study, focusing on the EPA's offset and banking programs.

LITAN, ROBERT E., & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION (1983). Especially relevant is the typology of federal regulation in Ch. 3 (Why and How We Regulate).

6 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2787-2830 (3d ed. 1990). The authors trace the background of the use of self-regulation versus governmental regulation in the organization of the NASD and discuss the nature of the NASD-SEC relationship.

Lurie, Jonathan. *Commodities Exchanges as Self-Regulating Organizations in the Late 19th Century: Some Perimeters in the History of American Administrative Law,* 28 RUTGERS L. REV. 1107 (1975). Comprehensive review of exchange decisions regarding market designation and disciplinary actions against members, and regulation in and judicial review by states. He concludes that courts were deferential to the exchanges' decisions in both areas, creating in the process an early model of judicial review of administrative agency action.

MacAvoy, Paul W., & Dorothy M. Tella, *The Impact of Regulation on the Performance of Industry,* in JOINT ECONOMIC COMMITTEE, 96TH CONG., 2D SESS., GOVERNMENT REGULATION: ACHIEVING SOCIAL AND ECONOMIC BALANCE 176-196 (1980). Focuses primarily on the costs of regulation and the inflationary impact of those costs, but also has a useful description of the historical change in regulatory focus and the difficulties faced by the new health, safety and environmental regulatory agencies.

Markham, Jerry W. *The Commodity Exchange Monopoly — Reform is Needed,* 48 WASH. & LEE L. REV. 977 (1991). A demonstration of the failure of commodities markets to regulate their own members' conduct, suggesting that opening them to competition from other markets, more well disciplined now than in 1922 when the commodities markets were given a monopoly on trading these instruments, could improve their performance.

MARKHAM, JERRY W. COMMODITIES REGULATION: FRAUD, MANIPULATION & OTHER CLAIMS (1988 & Supp.). A treatise relating primarily to commodities trading fraud, but Ch. 26 discusses the self-regulatory environment in commodities regulation similar to that in securities regulation.

MARKHAM, JERRY W. THE HISTORY OF COMMODITY FUTURES TRADING AND ITS REGULATION (1987). A complete narrative of the development of the markets and the federal regulation, with a complete discussion of each type of regulated financial product and details of the organization and operation of the CFTC.

MCCRAW, THOMAS K., PROPHETS OF REGULATION (1984). Case studies of four key regulators (Charles Francis Adams, Louis Brandeis, James Landis and Alfred Kahn), with helpful discussions about Landis' use of self-regulation at the SEC, and an ending discussion on the use of economic motivations in structuring effective regulation.

McCraw, Thomas K. *Regulatory Change, 1960-79, in Historical Perspective,* in JOINT ECONOMIC COMMITTEE, 96TH CONG., 2D SESS., GOVERNMENT REGULATION: ACHIEVING SOCIAL AND ECONOMIC BALANCE 1-17 (1980). Charts three periods of regulation, of which the most recent is the most confusing, due to the rise of "single-issue" politics. This resulted in new functional regulation during a period of contradictory emphasis on deregulation. Concludes that these new types of regulations will be considered valuable by society regardless of cost for several years, will require different modes of implementation, and cooperation from business.

* McGarity, Thomas O. *Regulatory Reform in the Reagan Era,* 45 MD. L. REV. 253 (1986). McGarity reviews of the history and typology of regulatory reform techniques from the 1930s, and then surveys their use by the Reagan Administration. Although he concludes that reform has had major setbacks, particularly in its legislative efforts, he believes the underlying goals and justifications for regulatory reform remain intact.

Mellette, Peter M. *The Changing Focus of Peer Review Under Medicare,* 20 U. RICH. L. REV. 315 (1986). A full historical discussion of peer review from before Medicare through the creation of the PRO program, concluding with some critiques of the PRO program.

MELNICK, R. SHEP. REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983). General analysis of judicial review of EPA regulations under the Act. Although exhaustive in scope, the book does not focus on emissions trading programs.

Miller, Sam S. *Self-Regulation of the Securities Markets: A Critical Examination,* 42 WASH. & LEE L. REV. 853 (1985). Miller reviews the usual concerns about self-regulation (over- or under-regulation, insulation, anticompetitive conduct, abuse of members' rights) with particular emphasis on the securities industry, and discusses the Congressional responses to these problems, most notably in the Securities Acts Amendments of 1975. He concludes that there may be over-reliance on self-regulation in the securities industry, and would restrict it more to technical areas of market operation, referring to a model developed by Lipton (discussed this bibliography).

MITNICK, BARRY M. THE POLITICAL ECONOMY OF REGULATION (1980). A full treatment of the political processes of regulation: life cycle, origins, goals and methods, and deregulation.

Moe, Ronald C. Privatization: An Overview from a Public Administration Perspective, Cong. Res. Serv. Rept. No. 88-201 (Mar. 2, 1988). Surveys rationales for choosing various levels of public intervention, discussing "market failure" theories and public choice theories.

Nachbar, Marshall J. *Contract Market Self-Regulation Under the Commodity Exchange Act*, 31 CLEV. ST. L. REV. 573 (1982). A brief history of development of commodities trading and a complete narrative review of existing CFTC requirements for commodities exchange self-regulation. He concludes that some of those requirements may, by mandating information production and storage, created more accessible information resulting in better self-regulation especially through private litigation.

NOLL, ROGER G., AND BRUCE M. OWEN, THE POLITICAL ECONOMY OF DEREGULATION(1983). The authors use the "interest group" model of regulation to describe existing regulation and the theory is applied to five specific examples, concluding with models and suggestions to make deregulation possible in an environment of regulation supported by various interest groups.

Note, *Delegation of Power to Private Parties*, 37 COLUM. L. REV. 447 (1937). Early summary of mostly state cases on delegation to "non-official" (private) groups. Severely critical of existing judicial analysis, advocating application of the same standard applied to delegations to governmental bodies as set forth in the then-recent *Schechter Poultry* and *Panama Refining* cases.

Note, *Professional Self-Regulation,* 29 ALA. L. REV. 679 (1978). Survey of licensing and regulation focused on Alabama law. The author undertakes a useful typology of regulation: (1) occupations having no relation to public welfare and not subject to regulation (mostly an empty class, analogous to substantive due process); (2) occupations related to public welfare sufficiently to justify health and safety regulation; (3) occupations related to public welfare sufficiently to justify entrance restriction; (4) "learned professions" (historically law, medicine, divinity). In category (3), the author recognizes the "welfare" justification as a facade in many cases for entry restriction to limit competition.

Oulahan, Courts. *The Legal Implications of Evaluation and Accreditation,* 7 J. L. & EDUC. 193 (1978). Critical review and collection of major cases, particularly legal arguments based on due process ("state action" question), antitrust laws, due process, and the scope of authority of the Commissioner [now Secretary] of Education.

PRIVATE ACCREDITATION IN THE REGULATORY STATE (materials prepared for conference sponsored by Am. Bar Ass'n Sec. of Admin. L. & Pract., May 21, 1993). Comprehensive summaries of self-regulatory efforts in accreditation of

hospitals, other health care facilities, and colleges and universities, covering each aspect of regulation.

Ponsoldt, James F. *The Application of Sherman Act Antiboycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles,* 55 S. Cal. L. Rev. 47-52 (1981). Reconciles cases to a statement of coherent doctrine, applicable both to audited and voluntary self-regulation.

Rabin, Robert L. *Federal Regulation in Historical Perspective,* 38 Stan. L. Rev. 1189 (1986). A detailed review of 100 years of regulation, including the political and social events preceding each wave of regulation or regulatory reform, and the judicial responses, connecting the politics of the regulation with the growth of the resulting administrative law.

Redish, Martin H., & Lawrence C. Marshall. *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455 (1986). The authors seek to establish "core" due process requirements from the current "balancing" due process jurisprudence; they identify as such values an impartial adjudicator in all cases and notice and hearing in most cases.

Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 4, at 495-722 (1963). Chapter 12 of the Special Study focuses on the "Regulatory Pattern," discussing philosophies of self-regulation and its use in each exchange and the NASD.

Rhinelander, Laurens H. *The Bubble Concept: A Pragmatic Approach to Regulation Under the Clean Air Act*, 1 Va. J. Nat. Resources L. 177 (1981). A summary of the economic theory of "bubbles," a summary of EPA's 1975 and 1979 bubble regulations and their invalidation in court. Rhinelander concludes that the use of bubbles should be increased, and proposes changes in the three EPA program areas involved.

Roberts, Marc J. *Some Problems of Implementing Marketable Pollution Rights Schemes: The Case of the Clean Air Act*, in Reform of Environmental Regulation 93-117 (Wesley A. Magat ed. 1982). A comprehensive review of the information and technology problems and impossibilities keeping the economist's ideal solution from any significant implementation.

Rubin, Edward L. *Due Process and the Administrative State,* 72 Cal. L. Rev. 1044 (1984). Exhaustive survey of due process doctrines with a view toward formulating certain minimum standards instead of courts' current unfocused balancing tests.

Schoenbrod, David. *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. Rev. 740, 756-59 (1983). A convincing case for why the Clean Air Act was a failure, and a classical critique of "command and control" regulation, especially when done without guidance from Congress. By advocating "rules" statutes, Schoenbrod seems to suggest that "command and control" rules can work if Congress is the source of those rules.

Schultze, Charles L. The Public Use of Private Interest (1976). Schultze exhorts regulators to consider using the market to supplant government "command-and-control" regulation wherever possible. He uses EPA and OSHA as examples. The "command and control" regulation stemmed from the early desire to limit governmental power, but is inappropriate to the new pervasive "social regulation." That type of regulation is uniquely suited to modifications of private incentives.

Selden, William K. Accreditation: A Struggle Over Standards in Higher Education (1960). Chapter 4, pp. 29-44, provides an excellent early history of accreditation efforts by colleges and universities. Chapter 5, pp. 45-54, provides an excellent early history (through 1952 legislation) of the limited federal government in accreditation.

Shapiro, Sidney A., & Thomas O. McGarity. *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 Yale J. Reg. 1 (1989). Comprehensive review of why OSHA has failed by a wide margin to live up to Congress' expectations in 1970. Authors undertake a detailed analysis of the industry, internal administrative and political issues involved in enforcement of the Act, and recommend several reforms from "patch and repair" to significant Congressional overhaul. Significantly, self-regulation does not figure into this scheme in an area where one might expect to see it: a large regulated body, agency lack of manpower and expertise, technical questions suitable for negotiation, for example.

Smythe, Marianne K. *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. Rev. 475 (1984). Overview of the development of securities regulation, with occasional mentions of its use and benefits in other areas. Focus is then on the application of principal antitrust cases in the area, concluding that the 1975 Securities Acts Amendments provide a model for securing exemptions from antitrust laws to self-regulatory programs.

Stewart, Richard B. *Madison's Nightmare*, 57 U. Chi. L. Rev. 335 (1990). Stewart describes Madison's original scheme of countervailing powers has resulted in these groups instead dividing power among themselves, so that

Congress in 1960s and 1970s was able to expand regulatory authority far beyond its supervisory ability. The solution requires a break from "command and control" regulatory strategies, much along the lines of Schultze.

Stewart, Richard B. *Reconstitutive Law,* 46 MD. L. REV. 86 (1986). Describing and extolling the title concept as a middle ground between traditional prescriptive regulation and deregulation or "delegalization."

Stewart, Richard B. *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENV. L. REV. 1 (1985). Another in Stewart's series of articles extolling the benefits of incentive regulation. Most helpful is Pt. V (20-22) explaining why this type of regulatory reform is misunderstood and currently so difficult to implement.

Sunstein, Cass R. *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990). Defining a regulatory paradox as "a self-defeating regulatory strategy," Sunstein details five, such as "overregulation produces underregulation" and so on. Nowhere mentioned is any suggestion that self-regulation leads to more direct agency regulation, but application of Sunstein's analysis might be useful.

THOMPSON, FRED, & L. R. JONES. REGULATORY POLICY AND PRACTICES: REGULATING BETTER AND REGULATING LESS (1982). A comprehensive theoretical (mostly economic) treatment of regulation: definition, extent, objectives, and alternatives for both procedural and substantive reform. Helpful in defining regulation and objectives, but no specific discussion of self-regulation beyond what can be extrapolated from general discussions.

TIETENBERG, THOMAS H. EMISSIONS TRADING (1985). An exhaustive compilation of studies on emissions trading combined with the author's own 13 years of study. The text includes in-depth sophisticated economic analysis of each aspect of emissions trading.

UNITED STATES GENERAL ACCOUNTING OFFICE, NRC'S RELATIONSHIP WITH THE INSTITUTE OF NUCLEAR POWER OPERATIONS (1991). A study upon congressional request, finding that the NRC does not rely on information supplied to it by INPO, but recommending that the NRC issue publicly-available notices even when they would duplicate INPO industry notices, which are typically not publicly-available.

* Verkuil, Paul R. *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213. An initial review of the Act, comparing it with the Paperwork Reduction Act and Executive Order 12,291 (cost-benefit analysis). He predicts

the effectiveness of the Act depends almost entirely on the effort by the SBA's Office of Advocacy, and a resolution of the unclear provisions on judicial review.

Vogel, David. *The "New" Social Regulation,* in REGULATION IN PERSPECTIVE (Thomas K. McCraw ed. 1981). He defines "social" as consumer and environmental protection, and surveys the development of these regulatory agencies in the 1960s and 70s. The important differences are the cut of these regulations across industry lines and the input given to nonindustry constituencies, which makes these agencies fundamentally different from the then more typical single-industry or single-interest agencies.

Werner, Walter. *The SEC as a Market Regulator*, 70 VA. L. REV. 755 (1984). Describes the SEC's limited efforts in market regulation as opposed to disclosure regulation, and suggests that most of the SEC's inaction or inept action is due to its inability to understand the operations of the securities markets. Werner's analysis suggests some minimum standards of agency expertise are necessary before invoking supervised self-regulation.

Westwood, Howard C., & Edward G. Howard, *Self-Government in the Securities Business,* 17 LAW & CONTEMP. PROBS. 518 (1952). An early historical examination of the development of self-regulation with particular emphasis on the establishment of the National Association of Securities Dealers (NASD), its unique status, and the role of the SEC in overseeing the NASD, particularly its disciplinary actions.

WILSON, JAMES Q. BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989). Chapter 19, "Markets," is the most relevant. Though Wilson refers primarily to privatization or contracting for government services, the four standards he posits against which to measure alternative arrangements for supplying a publicly-funded service — efficiency, equity, accountability and authority — might well serve as useful measures for self-regulatory as well as private enterprises.

YOUNG, KENNETH E., ET AL., UNDERSTANDING ACCREDITATION (1983). A comprehensive survey of issues in accreditation of postsecondary educational institutions. Most relevant for purposes of this study are Chapters 1 (history of accreditation), 3 (accreditation discussed as part of a broader concept of self-regulation, and 13 (the federal government and accreditation).

Report for Recommendation 94-2

Civil Forfeiture: The Issues and Some Recommendations

Arnold H. Leibowitz, Esq.
Conference Consultant

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

I. SUMMARY OF RECOMMENDATIONS 179
II. INTRODUCTION 181
III. BACKGROUND OF FORFEITURE LAW 182
IV. MODERN FORFEITURE STATUTES 183
  A. The Seizure 185
    1. Probable Cause 185
    2. Constitutional Limitations on Seizures 185
      a. Due Process: The Requirement of Notice and Hearing 185
      b. The Special Case of Real Property 186
      c. Eighth Amendment: Excessive Fines 187
  B. The Claimant 188
  C. Remission or Mitigation 189
    1. Federal Common Law View 189
    2. Federal Remission & Mitigation Statute 190
    3. Regulations 190
    4. Department of Justice Guidelines 191
  D. The Forfeiture 192
    1. Administrative Forfeiture 192
    2. Judicial Forfeiture 193
    3. Tactical Advantages of Civil Forfeiture Seizures 194
    4. The Question of Bias 195
  E. Contesting the Seizure and Forfeiture 196
    1. Standing 196
    2. Time Limitations 197
    3. The Innocent Owner Defense 199
      a. Lack of Knowledge/Lack of Consent 200
      b. Reasonable Precautions to Prevent the Violations 201
  F. Equitable Sharing 201
    1. Purpose of the Program 202
    2. Proposed Limitations 204
V. RECOMMENDATIONS 205

I. Summary of Recommendations

This is an overview of civil forfeiture, the government's method of confiscating property of suspected criminals, particularly those involved in drug dealing. This report sketches the origins and general attributes of civil forfeiture practice in this country, the distribution and management of the hundreds of millions of dollars in cash generated by forfeiture, and sets forth the key legal and policy issues raised by forfeiture's unique procedures and doctrinal approaches.

Because of the traditional, doctrinal view that civil forfeiture is remedial rather than penal, the government, when it utilizes civil forfeiture, avoids in many cases constitutional and criminal procedural requirements required where penal sanctions are being imposed. This avoidance has been increasingly challenged in recent years by the press,[1] members of Congress and the courts on the grounds that civil forfeiture does, indeed, involve a taking of property as punishment and should be constrained by the same procedures as restrain criminal forfeiture. The Supreme Court has begun, most notably in its last session, to respond to the criticism and impose aspects of the Eighth Amendment[2] on all forfeitures, civil as well as criminal, and to impose, as a matter of due process, the administrative procedural requirements of notice and hearing on real property seizures.[3]

The U.S. government—the Department of the Treasury and the Department of Justice—have responded to the criticism by establishing asset forfeiture policy offices at Departmental level. These offices have issued a series of policy guidelines[4] to constrain the actions of its constituent agencies. They have argued these guidelines,[5] self-policing actions, are sufficient to protect the public.

---

[1] The series of articles in the Pittsburgh Press and Orlando Sentinel revealing serious excesses of prosecutorial behavior and, perhaps, racist behavior brought about extensive reviews of forfeiture policy. Schneider and Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, August 11-16, 1991; Brazil and Berry and the Sentinel staff, ORLANDO SENTINEL, June 14-25, 1992.

[2] Alexander v. United States, 509 U.S. 1133, 125 L.Ed.2d 441 (1993) (Excessive fines clause of Eighth Amendment applicable to criminal forfeiture); Austin v. United States, 509 U.S. 1133, 125 L.Ed.2d 488 (1993) (Excessive fines clause of Eighth Amendment applicable to civil forfeiture).

[3] U.S. v. Good Real Property, 510 U.S. ___, 114 S.Ct. 492, 62 U.S.L.W. 4013 (Dec. 13, 1993).

[4] E.g., Executive Office of Asset Forfeiture in the Office of the Assistant Secretary (Enforcement), Dept. of the Treasury, *Policy Directives* (July 1993); Dept. of Justice, *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990).

[5] The guidelines are very similar and, in practice, the two offices coordinate closely with each other, reflecting the interweaving of the statutes. Thus, 21 USC 881(d) incorporates the "provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws." This report frequently discusses only one of the Department's approaches as sufficient to make the point. The GAO has suggested consolidating the two offices.

Given the similarities in Justice's and Customs' seized property programs, consolidation makes sense. Both agencies seize similar types of assets, and those assets are generally located in the same geographic areas. However, under the current operating structure, each agency maintains separate and

Seizure, forfeiture, and remission determinations result, in general, from decisions and processes wholly within the law enforcement agency itself. The propriety of the seizure; whether there was probable cause; whether the seized property was excessive; whether the seized property bore sufficient connection to the illegal acts to be seized; whether proper notice was given of the intent to forfeit; and whether, in the case of land or commercial property, the property is being handled in a way least likely to cause damage after the seizure, prior to forfeiture, are all decided by the agency. Questions of remission and mitigation are also decided solely by the seizing agency without a hearing or public justification. Going outside the agency would permit the parties to discuss the contending factors of the private interest involved, the risk of an erroneous deprivation, and the government's interest to be openly and fairly determined.

The thrust of the key recommendation in this report is to require that these critical questions, and the critical act of forfeiture particularly, take place outside the enforcement agency to obtain greater openness and stronger public institutional participation in the forfeiture process. The report, therefore, recommends that an administrative tribunal be established where these issues can be addressed publicly and consistently.

As a corollary to this recommendation, detailed information on remissions and forfeitures will be publicly and readily available. At present this information is available only to the enforcement agency which may make it available only in summary fashion. It is expected that as a consequence of this recommendation clear guidelines in law and regulation will be established outside the enforcement agency.

The report recommends as well, consistent with the desire for openness, that a forfeiture registry be established which would act as the one medium to which all notices of forfeiture would appear and the nature and quantity of the property seized can be reported to the public.

---

distinct programs for managing and disposing of its property. Justice, through the Marshals Service, contracts directly with vendors that provide the service. Customs has a nationwide contractor that provides custodial services either directly or through subcontracts with other vendors. GAO, *Asset Forfeiture Programs* (Dec. 1992), p.22

II. Introduction

The law classifies forfeitures as criminal or civil according to the procedure by which the government perfects its title in the confiscated property. Criminal forfeiture follows as a consequence of criminal conviction of the property owner. Civil forfeiture is accomplished by civil proceedings, *in rem*, against the property itself.

The advantage of civil forfeiture, much more widely used than criminal forfeiture, is that it provides for forfeiture regardless of the current status of the property's owner. Even if the owner is dead or has fled the U.S., the property can be forfeited since the property itself, and not any individual, is the "defendant" in the suit. Criminal forfeiture is based upon the jurisdiction the court has over the defendant rather than his or her property. It has the advantage of casting a "wider net," capable of reaching, in one proceeding, all of a defendant's forfeitable assets, regardless of location and scope.

But criminal forfeiture is much less certain and considerably slower than civil forfeiture. Criminal forfeiture of property is contingent upon the conviction of its owner. Criminal forfeiture only divests the convicted defendants of their right in the property. To obtain clear title, the government must address (through a post-trial proceeding known as an ancillary hearing) the interests others may hold in the property.

There may be more than a hundred federal forfeiture laws, but the civil forfeitures which generate the most revenue are those of the Controlled Substances Act,[6] the racketeering statute (RICO),[7] and the money laundering provisions[8] and it is on these upon which we will specifically focus. Cash is the property most often confiscated, followed at some distance by real estate and then conveyances, mostly motor vehicles.[9]

---

[6] Section 881 authorizes civil forfeiture in narcotics cases. In pertinent part, this law authorizes the following forfeitures:

> (a)(4)—All conveyances...used, or...intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [a controlled substance]...,
>
> (a)(6)—All moneys, ...or other things of value furnished or intended to be furnished...in exchange for a controlled substance...[and] all proceeds traceable to such an exchange...; and
>
> (a)(7)—All real property... which is used, or intended to be used...to commit, or to facilitate the commission of a [designated] violation of this title....

[7] 18 USC 1961-68 (1988).

[8] 18 USC 981-982 (1988).

[9] General Accounting Office, Asset Forfeiture: Noncash Property Should Be Consolidated Under the Marshals Service, 4-5 (June 28, 1991).

In the course of the discussion, this report, in addition to these guidelines, discusses the alternate statutory provisions being proposed by a number of organizations: the Model Asset Seizure and Forfeiture Act (MASFA)[10]; the draft Model Civil Forfeiture Act (Drug Commission Model)[11]; the proposed Article V, Civil Forfeiture, Amendments to the Uniform Controlled Substances Act (the NCCUSL Model)[12]; the Model Civil Forfeiture bill (the ACLU Model)[13]; and various Congressionally introduced bills: H.R. 1774 (the Conyers bill)[14] and the Civil Asset Forfeiture Reform Act of 1993, H.R. 2717 (the Hyde bill).[15]

III. Background of Forfeiture Law

Present forfeiture law has its roots in early English law. It is a product of three early English procedures: the law of deodand, common law forfeiture, and, most importantly, statutory or commercial forfeiture.

At early common law, the object that caused the death of a human being—the ox that gored, the knife that stabbed, the cart that crushed—was confiscated as a deodand. Coroner's inquests and grand juries, charged with determining the cause of death, were obligated to identify the offending object and determine its value. The value of the offending instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand—the object forfeited—was put to charitable uses. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness.[16]

Although deodands were not unknown in the American colonies, they appear to have fallen into disuse or been abolished by the time of the American Revolution or shortly thereafter.

Forfeiture of estates or common law forfeiture, unlike deodands, focused solely on a human offender. At common law, anyone convicted and attained for treason or a felony forfeited all his lands and personal property, "estate forfeiture."[17] These forfeitures obviously served to punish felons and traitors. They were justified on the ground that property was a right derived from society, a right which one lost by violating society's laws. In colonial America, common law forfeitures were rare. After the Revolution, they were effectively eliminated when the Constitution restricted the use of common law forfeiture in cases of treason and Congress restricted its use in the case of other crimes.

---

[10] MAFSA was prepared by the American Prosecutors Research Institute under contract to the U.S. Department of Justice and was endorsed by the U.S. Department of Justice, the National Association of State Attorneys General and the National Association of District Attorneys.

[11] The Model Civil Forfeiture Act was prepared by the President's Commission on Model State Drug Laws.

[12] The proposed Amendments were drafted and are being discussed by the National Conference of Commissioners on Uniform State Laws.

[13] Proposed by the American Civil Liberties Union.

[14] H.R. 1774, introduced by Congressman John Conyers (D. MI) in the 102nd Congress.

[15] H.R. 2417, introduced by Congressman Henry Hyde (R. IL) in the 103rd Congress.

[16] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-683 (1974).

The third antecedent of modern forfeiture, the one of greatest significance for present forfeiture practice, was statutory forfeiture which was used fairly extensively to combat smuggling and other revenue evasion schemes in the American colonies. In most instances, the statutes called for *in rem* confiscation proceedings in which, as with deodands, the offending object is the defendant. Occasionally, these statutes established *in personam* procedures where confiscation occurs as the result of the conviction of the person, the owner of the property.

The early cases recognized forfeiture's basic penal character.[18] In these cases, forfeiture was justified on two theories: that the property itself is "guilty" of the offense or that the owner may be held accountable for the wrongs of others to whom he entrusts his property. In the last analysis, both theories rest on the notion that the owner has acted improperly in allowing his property to be misused and that he is properly punished for that wrongful or negligent action.[19]

The Government's right to take possession of property in all of these early American cases stemmed from the misuse of the property itself. Indeed, until 1967 the government had power to seize only property that "the private citizen was not permitted to possess." In that year, the Supreme Court, in *Warden v. Hayden*,[20] held that the Fourth Amendment did not prohibit the seizure of "mere evidence."[21]

IV. Modern Forfeiture Statutes

Modern forfeiture is a creature of statute. Most state and federal forfeiture statutes authorize civil forfeiture. The original forfeiture provisions in the Comprehensive Drug Abuse Prevention and Control Act of 1970[22] closely paralleled the early statutes used to enforce the customs laws, the piracy laws, and the revenue laws. The 1970 law generally authorized the forfeiture of property used in the commission of criminal activity. It applied to stolen goods but did not apply to proceeds from the sale of stolen goods. It contained no innocent owner defense.

---

[17] The Palmyra, 12 Wheat. 1, 14 (1827).

[18] Peisch v. Ware, 4 Cranch 347 (1808).

[19] Austin v. U.S., 509 U.S. ___, 113 S.Ct. 2801, 12 L.E.2d 488, 501 (1993).

[20] 387 U.S. 294 (1967).

[21] A precedent for this expansion had been established in 1970 by the Racketeer Influenced and Corrupt Organizations Act (RICO), see 18 USC Sec. 1963(a). Even RICO, however, did not specifically provide for the forfeiture of "proceeds" until 1984, when Congress added Sec. 1963(a)(3) to resolve any doubt whether it intended the statute to reach so far. Russello v. United States, 464 U.S. 16 (1983).

[22] Pub.L. No. 91-513, sec. 511, 84 Stat. 1236, 1276 (1970) (prior to 1978 amendment).

In 1978 Congress amended the 1970 Act, to authorize the seizure and forfeiture of proceeds of illegal drug transactions.[23] This marked an important expansion of governmental power. The Congressional civil forfeiture expansion was intended to give prosecutors an effective mechanism for striking at the profits of narcotics trafficking.[24] When introducing the statute in the United States House of Representatives, Congressman Rogers, a Democrat from Florida, stated:

> The purpose of Title III of the Senate amendment is to provide Federal drug enforcement officials with the ability to strike at the profits of illicit trafficking in abusable controlled substances.[25]

Congressman Carter, a Republican from Kentucky, echoed this purpose stating:

> [T]he Senate amendment expands section 511 of the Controlled Substances Act to require the forfeiture of all moneys or other things of value which are substantially connected to a criminal violation of our drug control laws. In other words, Mr. Speaker, the Senate amendment simply requires the drug pusher to give up his ill-gotten gains.[26]

A prosecutor need not trace the proceeds to a particular narcotics transaction. He must only link the proceeds to narcotics trafficking generally.[27] In 1984, Congress further amended the law to authorize the forfeiture of real property.[28]

Federal forfeiture legislation, as amended in 1978 and subsequently, and the state counterparts, have been effective from a financial point of view:

---

[23] Pub. L. No. 95-633, sec. 301(a), 92 Stat. 377 (1978).

[24] 21 USC Sec. 881(a)(6).

[25] 124 Cong. Rec. H12790 (Oct. 13, 1978).

[26] *Id.* at H12,793.

[27] U.S. v. Parcels of Land, 903 F.2d 36, 38 (1st Cir. 1990). (Massive cash expenditures plus attempt to shield money from government attention indicate drug trafficking.) United States v. $4,255,000,762 F.2d 895, 904 (11th Cir. 1985) ("[N]othing in the statute requires evidence of a particular narcotics transaction, and we decline to impose such a requirement here."), *cert. denied*, 474 U.S. 1056 (1986); United States v. $250,000, 808 F.2d 895, 899-900 (1st Cir. 1987) ("The government need not, however, produce any evidence linking the money to any particular drug transaction.").

[28] *See* 21 USC 881(a)(7); P.L. 98-473, 306, 98 Stat. 2050.

confiscating millions of dollars in cash, real estate, vehicles, vessels, airplanes, and even businesses.[29]

A. The Seizure

1. Probable Cause

Civil forfeiture begins with a seizure by the government of privately-owned property. The decision to seize is made by the operational prosecutorial agency in the field if the agency believes there is probable cause to link the property to narcotics trafficking. The probable cause standard requires "reasonable ground for belief...[that the property constitutes proceeds of narcotics trafficking], supported by less than prima facie proof but more than mere suspicion."[30]

Direct evidence is not required to meet the probable cause standard. "Circumstantial evidence and inferences therefrom are good grounds for a finding of probable cause in a forfeiture proceeding."[31] Evidence that would be inadmissible at trial may be used as long as the evidence is reliable.[32]

2. Constitutional Limitations on Seizures

The power to seize, if the probable cause standard is met, has few other limitations.

a. Due Process: The Requirement of Notice and Hearing

Calero-Toledo v. Pearson Yacht Leasing Co.[33] addressed the constitutionality of summary seizure of property in the context of Puerto Rico's civil forfeiture statute. The case involved the forfeiture of a yacht that the Pearson Yacht Leasing Company, based in the States, had rented to two Puerto Rican residents. After finding a marijuana cigarette on the vessel, Puerto Rican authorities seized the yacht without giving prior notice to the renters or to the Pearson Yacht Company.

---

[29] In FY 92, total seizures by the Department of Justice were estimated at $1.9 billion and total forfeitures at $641 million. Executive Office of Asset Forfeiture, Office of the Deputy Attorney General, *Annual Report of the Dept. of Justice Asset Forfeiture Program, Fiscal Year 1992*, p.26.

[30] United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980); United States v. $250,000, 808 F.2d 895, 897 (1st Cir. 1987) (quoting *One 1978 Chevrolet Impala*); United States v. A Single Family Residence, 803 F.2d 625, 628 (11th Cir. 1986); United States v. Dickerson, 857 F.2d 1241, 1244 (9th Cir.), amended and superseded by, 873 F.2d 1187 (9th Cir. 1988) (To pass the point of mere suspicion and to reach probable cause, it is necessary to demonstrate by some credible evidence the probability that the plane was in fact used to transport a controlled substance.).

[31] United States v. Brock, 747 F.2d 761, 763 (D.C. Cir. 1984). (Probable cause found and forfeiture of $120,000 worth of jewelry found in claimant's attic sustained. Relying solely on circumstantial evidence.).

[32] United States v. One 1986 Chevrolet Van, 927 F.2d 39, 42 (1st Cir. 1991) (probable cause can be established with otherwise inadmissible evidence so long as it is reliable).

[33] 416 U.S. 663 (1974).

The procedure in *Calero-Toledo* raised the constitutional issue of whether it violated due process to seize property without prior notice or hearing. The Supreme Court justified seizure of the yacht without notice or hearing by stressing the public's interest "in preventing continued illicit use of the property" and the risk that advance notice would facilitate the vessel's concealment or even its removal from the jurisdiction. The Court concluded that these circumstances presented "an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." Thus, *Calero-Toledo* established the principle that due process does not require a pre-seizure forfeiture hearing.

b. The Special Case of Real Property

(1) The Balancing Test of *Matthews v. Eldridge*

The Florida Supreme Court held that in the case of real property due process requires the state to use means less restrictive than seizure, if possible, to protect the respective interests and safeguard the constitutional rights being impinged. If the government seeks a restraint greater than a *lis pendens,* notice and an adversarial hearing is required.

Regarding matters of real property, due process requires that the state must provide notice and schedule an adversarial hearing for interested parties on the question of probable cause *prior* to any initial restraint, other than *lis pendens*, on the real property being subjected to forfeiture. To comply with due process, a real property forfeiture action under the Act would begin with the state's filing of a petition for rule to show cause in the circuit court where the property is located or where the crime is alleged to have taken place. Simultaneously, the state would record a notice of its petition with the property records of the appropriate clerk of court's office, which will serve as a *lis pendens.* This recordation shall be deemed a constructive "seizure" for purposes of commencing a forfeiture action under the Act. The state would immediately schedule an adversarial preliminary hearing to determine if probable cause exists to maintain the forfeiture action, and to resolve all questions pertaining to the temporary restraints on the real property pending final disposition.[34]

The Second Circuit in three recent cases—all decided prior to *Austin*—has elaborated for the Federal courts on the due process limitations of a seizure of assets without a prior hearing or a prompt post-seizure hearing. The three cases involved real property, seized by the government after the issuance of a warrant based on a finding of probable cause by a judicial officer after an ex parte hearing. The Second Circuit utilized the balancing test of *Matthews v. Eldridge*[35] to determine the constitutional adequacy of the *ex parte* procedure, by balancing (1) the private interest involved, (2) the risk of an erroneous deprivation of that interest through the procedures utilized, as well as the probable value of additional procedural safeguards, and (3) the government's interest, including the burden that additional procedural requirements would impose.

---

[34] Department of Law Enforcement v. Real Property, 588 So.2d 957, 960 (Fla. 1991).

In *Livonia*,[36] the government seized a home; in *141st Corp.*,[37] the seizure was of an apartment building for commercial purposes; and *Statewide Auto Parts*,[38] involved seizure of a commercial business. The Second Circuit had distinguished among the various types of real property in setting out the procedural protection thereby required prior to seizure.

The Supreme Court in *United States v. Good Real Property*[39] effectively eliminated such distinctions, holding that in all cases of real property seizures, not just residences, notice and an adversary hearing is required prior to seizure. Although it reaffirmed the *Matthews v. Eldridge* balancing test,[40] the Court held since real property "by its very nature can be neither moved nor concealed," due process considerations require notice and hearing. Seizure protections are not limited to the Fourth Amendment but embrace due process under the Fifth and Fourteenth Amendments as well.

c. Eighth Amendment: Excessive Fines

Austin v. United States[41] may restrict the *Calero-Toledo* holding. In *Austin*, the Supreme Court held that the Eighth Amendment clause prohibiting the imposition of excessive fines applied to a drug-related forfeiture of property to the United States under sections 881(a)(4) and 881(a)(7) because such a forfeiture constituted payment to a sovereign as punishment for some offense. The Court, however, did not decide on a test to determine whether a particular forfeiture is excessive and it provided no guidance to the lower courts in developing such a test.

Austin may inhibit government action probably preventing the pursuit of a "zero tolerance" policy. On the other hand, *Austin* may prevent egregious acts by the government; i.e., the forfeiture of a yacht because a marijuana cigarette is found aboard or the forfeiture of family farms and homes for growing a small quantity of marijuana.

---

[35] 424 U.S. 319, 335 (1976).

[36] United States v. Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258, 1265 (2nd Cir. 1989), *rehearing denied*, 897 F.2d 659 (2nd Cir. 1989) (*Livonia*).

[37] United States v. 141st Street Corp by Hersh, 911 F.2d 870, 873 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (*141st Street Corp.*).

[38] United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2nd Cir. 1992).

[39] 510 U.S.___, 114 S.Ct. 492, 62 U.S.L.W. 4013 (Dec. 13, 1993).

[40] Chief Justice Rehnquist and Justices Scalia and O'Connor specifically dissented from the *Matthews v. Eldridge* reasoning. *Ibid*, slip op.

[41] 509 U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

B. The Claimant

Once the prosecution has established probable cause to support the seizure, the burden of proof shifts to the claimant. The standard of proof then becomes greater. In order to get the property back, the claimant must disprove the allegations by a preponderance of the evidence;[42] or, alternatively, that the seized property falls within one of the exemptions that have been established to protect third party interests, the criminal offense did not occur, or the property lacks the statutorily required nexus to the crime.

The irony is that in *Statewide Auto Parts*, although the property, the court found, was seized illegally, the property was not returned. The court said:

> [A]n illegal seizure of property does not immunize that property from forfeiture...the property itself cannot be excluded from the forfeiture action, and...evidence obtained independent of the illegal seizure may be used in the forfeiture action....

The remedy being offered the claimant was modest:

> The unlawfulness of the initial seizure would only preclude the government from introducing any evidence gained by its improper seizure of the premises.[43]

Not only is the property not returned in the case of improper prosecutorial action, an overzealous prosecutor is provided with prosecutorial immunity. In *Schrob v. Catterson*,[44] the Third Circuit held that the seeking of a search warrant and the filing of an *in rem* action "are so intimately and inexorably tied to the prosecutorial phase of the judicial process as to warrant the blanket protection that absolute immunity affords.[45]

---

[42] *See, e.g.*, United States v. a Single Family Residence, 803 F.2d 625, 629 (11th Cir. 1986) ("Once the government demonstrates that probable cause exists, the burden of proof in a civil forfeiture proceeding shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture."); One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986) ("Once the government shows that probable cause exists, the burden shifts to the claimant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture...."); United States v. $84,000, 717 F.2d 1090, 1101 (7th Cir. 1983) ("The government's burden was only to show probable cause for the forfeiture proceedings...[t]he burden then shift[s] to...claimants to show by a preponderance of the evidence that the property was not subject to forfeiture."), *cert. denied*, 469 U.S. 836 (1984). United States v. Sandini, 816 F.2d 869, 872 (3rd Cir. 1987).

[43] U.S. v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2nd Cir. 1992).

[44] 948 F.2d 1402 (3rd Cir. 1991).

C. Remission or Mitigation

In addition to challenging the seizure, an owner or anyone else with a property interest in the res may petition for remission or mitigation. Remission is a petition for return of all of the property seized or its entire value; mitigation returns only a portion.[46] Mitigation grants the return of the property provided the petitioner pays a penalty. A petition for remission or mitigation of forfeiture is a petition for administrative relief, not judicial relief.[47]

1. Federal Common Law View

Limited Character of Judicial Review

The courts have taken the position that "the remission of forfeitures is neither a right nor a privilege, but an act of grace."[48] Therefore, federal common law consistently has held the authority to grant remission or mitigation is totally at the discretion of the enforcement agency[49] and that federal courts lack jurisdiction to review the merits of a forfeiture decision. The Department of Justice guidelines follow this common law view that the Executive Branch decision on the merits is non-reviewable by the judiciary.[50]

Nevertheless, the judiciary has frequently exercised an "equitable or anomalous jurisdiction over agency forfeiture decisions"[51] based on the judiciary's supervisory authority over officers of the court. Further, the judiciary will grant relief upon a showing of refusal to consider a remission petition;[52] but this review, to date, has been very timid even when it finds government impropriety. Thus, in *McCoy v. U.S.*,[53] the district court found the government had failed to respond to claimant's petition for remission or mitigation for a year and four months, a delay which the court found "inexcusable."

---

[45] *Ibid* at 1415. Only qualified immunity applies to the government's post seizure actions in managing seized property.

[46] 28 CFR sec. 9.

[47] United States v. United States Currency Etc., 754 F.2d 208, 214 (1985).

[48] Matter of $67,470.00, 901 F.2d 1540, 1543 (11th Cir. 1990).

[49] The Laura, 114 U.S. 411 (1884) (holding that remission was the equivalent to a pardon).

[50] M. Troland, *Asset Forfeiture: Law, Practice and Policy* 119A (U.S. Dept. of Justice, Asset Forfeiture Office, June 1988).

"Courts have very limited authority in the area of petitions for remission or mitigation of forfeiture. They may direct that a particular petition be considered if the government has refused to take action or has been unduly dilatory. *They may not, however, review the merits of a petition or the government's ultimate decision*" (emphasis supplied), citing *One 1977 Volvo 242DL v. United States*, 650 F.2d 660, 662 (5th Cir. 1981) (per Curiam); DeVito v. United States, 520 F. Supp. 127, 129 (E.D. Pa. 1981); *Willis v. United States*, 600 F. Supp. 1407, 1417 (N.D. Ill. 1985)). Id. *See also*, United States v. One 1972 Mercedes-Benz 250, Etc., 545 F.2d 1233, 1236 (1976) (listing cases); United States v. One 1970 Buick Riviera, 463 F.2d 1168, 1170 (5th Cir. 1975), *cert denied*, 409 U.S. 980, (1972) (judiciary can require officials to exercise jurisdiction).

[51] *Ibid* at 1544, citing, *inter alia*, United States v. Chapman, 559 F.2d 402, 406 (5th Cir. 1977); Mason v. Pulliam, 557 F.2d 426, 428 (5th Cir. 1977).

A citizen should not be required to wait over a year and four months and forced to file a lawsuit to have a petition for remission or mitigation of forfeiture resolved by the DEA.[54] Despite this finding, the court limited the claimant's remedy to a suit under the Administrative Procedure Act to compel agency action.[55] McCoy, the court ruled, could not claim a due process violation when he could have cured the problem himself by filing such an action.

This result was not unexpected. The courts have consistently refused to decide whether an inordinate delay by the government gives rise to a due process claim[56] since the Supreme Court in its discussion of the issue specifically left that question open.[57]

2. Federal Remission & Mitigation Statute

Historically, the federal government has provided for administrative relief from forfeitures in cases where the party's conduct was undertaken "without willful negligence" or an intent to commit the offense.[58] The current federal remission statute follows this traditional practice. It authorizes the Secretary of the Treasury to remit or mitigate a forfeiture if the Secretary finds the forfeiture was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify" remission or mitigation.[59]

3. Regulations

The specific criteria governing remission and mitigation are set forth in published regulations[60] and provide as follows:

---

[52] In re Sixty Seven Thousand Four Hundred Seventy Dollars ($67,470.00), 901 F.2d 1540 (11th Cir. 1990); *but see* 18 USC 3668 (judicial remission or mitigation for forfeitures under federal liquor laws).

[53] 758 F.Supp.299 (E.D. PA 1991).

[54] *Ibid*, p.302.

[55] 5 USC 706(1).

[56] Matter of $67,470.00, 901 F.2d 1540, 1545-46 (11th Cir. 1990).

[57] United States v. Von Neumann, 474 U.S. 242, 250 (1986).

[58] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 n.27, quoting 19 USC § 1618. *See* The Laura, 114 U.S. 411, 414-15 (1885); United States v. United States Coin & Currency, 401 U.S. 715, 721 (1971).

[59] 19 USC § 1618 (1992).

[60] 28 CFR §9.5. Parallel INS regulations governing remission are at 28 CFR §274.

> (a) The Determining Official shall not consider whether the evidence is sufficient to support a forfeiture but shall presume a valid forfeiture.
>
> (b) *Remission.* The Determining Official shall not remit a forfeiture unless the petitioner establishes:
>
> (1) That petitioner has a valid, good faith interest in the seized property as owner or otherwise; and
> (2) That petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law; and
> (3) That petitioner had no knowledge of the particular violation which subjected the property to seizure and forfeiture; and
> (4) That petitioner had no knowledge that the user of the property had any record for violating laws of the U.S. or of any State for a related crime; and
> (5) That petitioner had taken all reasonable steps to prevent the illegal use of the property.

The Justice Department's regulations require the petitioner to demonstrate a higher standard of care than mere non-negligence in order to obtain remission, namely that he "had taken all reasonable steps to prevent the illegal use of his property."[61] This standard is a codification of the Supreme Court's reasoning in the *Calero-Toledo*[62] case, which suggested that forfeiture would not be constitutionally appropriate in the case of a party who had "taken all reasonable steps to prevent the illegal use of his property." In effect, the Justice Department regulations restrict remission to cases where the Department of Justice acted unconstitutionally.[63]

4. Department of Justice Guidelines

The Department of Justice has set forth guidelines for evaluating remission petitions, based on the criteria set forth in the regulations. According to the guidelines, the decision maker need not be concerned with or give consideration to attacks on the merits of the government's case, since a petition for remission or mitigation presumes a valid forfeiture.[64] Thus, challenges to such matters as the admissibility of evidence, the legality of seizure, or the existence of probable cause are misplaced in a petition that is, in essence, requesting an executive pardon.[65]

---

[61] 28 CFR § 9.5(b)(5).

[62] 416 U.S. 663.

[63] SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1986) at 15-14 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)) makes the same point, arguing "the Department now has decided to simply ignore the legislatively established traditional standard for granting relief."

No hearing is held on petitions for remission or mitigation of either administrative or judicial forfeitures.[66] Therefore, the petition itself must convince the decision maker that the petitioner is entitled to relief and establish that the petitioner meets the five criteria listed in section 9.5(b).[67]

D. The Forfeiture

1. Administrative Forfeiture

In the interests of expediency and judicial economy, Congress has authorized the use of administrative forfeiture as the next step in cases of uncontested seizures. Smaller civil forfeiture actions also are handled administratively in the federal system, rather than judicially, a procedure which is simpler, quicker, and less expensive.[68] Under federal customs law, administrative forfeiture may be used as well if the property to be forfeited is cash in any amount;[69] or if the property is worth less than $500,000; or is a boat, plane or car used to carry or store drugs.[70] The procedure requires that those with an interest in the property be notified of the seizure and given an opportunity to contest the seizure and proposed forfeiture. Although administrative forfeiture is done wholly within the confines of the prosecuting agency, the statute makes no distinction between administrative and judicial forfeiture either procedurally or substantively.

---

[64] M. Troland, *Asset Forfeiture: Law, Practice & Policy*, 117 United States Department of Justice, Asset Forfeiture Office (June 1988).

[65] *Id.* The INS regulations do not contain this provision, however. *Compare* 28 CFR § 9.5 *with* 8 CFR § 274.15.

[66] 28 CFR §§ 9.4(f) & (g), 9.3(d); Although 19 USC § 1618 authorizes the agency to take testimony on petition for remission or mitigation, nothing requires the agency to do so. Willis v. United States, 787 F.2d 1089, 1094 (7th Cir. 1986).

[67] M. Troland at 117-18.

[68] Warrant to Seize One 1988 Chevrolet Monte Carlo v. United States, 861 F.2d 307, 310 (1st Cir. 1988).

[69] Until 1990, the law required that all cash seizures over $100,000 be forfeited judicially. The GAO recommended that the law be changed so that all uncontested cash seizures could be forfeited administratively, regardless of amount. That recommendation was implemented in 1990. The seizing agencies reported that this change in law has resulted in seized cash being forfeited much faster without affecting individual due process rights. No outside evaluation of the change has been made. GAO, *Asset Forfeiture Programs* 21 (Dec. 1992).

[70] 19 USC 1607, 12 USC 881(d).

2. Judicial Forfeiture

Judicial forfeiture is required for any property other than monetary instruments and hauling conveyances if:

1. The value of the "other property" exceeds $500,000;
2. A claim and cost bond has been filed;
3. The property is real estate;[71]
4. A contesting claimant has requested judicial forfeiture proceedings.[72]

Where administrative forfeiture is unavailable either because of the nature or size of the forfeited property, or because a claimant has successfully sought judicial proceedings, the government may seek to secure a judicial declaration of forfeiture by filing a complaint or a libel against the property.[73] Since the proceedings are in rem, actual or constructive possession of the property by the court is a necessary first step in any confiscation proceeding[74] although the court's continued jurisdiction and control over the res is not necessary.[75]

Once the government proceeds to seek forfeiture before the judiciary, for the first time the case is looked at by someone outside the enforcement agency and impartial review of the action of the government can be obtained.

The burden of proof standard is subject to considerable debate. At present, Federal courts generally follow the civil law standard of preponderance of evidence. That standard is based on the principle that civil forfeitures are remedial rather than penal. The *Austin* holding by the Supreme Court erodes that principle; but whether it changes the burden of proof required by the government is still unclear.

The Florida Supreme Court has ruled that the government is constitutionally required to prove its case by "clear and convincing evidence."[76] However, none of the federal circuit courts have held that this higher evidentiary standard was required.

---

[71] The requirement of judicial forfeiture in the case of real estate is not a statutory mandate. Both Department of Justice and Department of Treasury policy require it.

[72] 19 USC 1607, 1608.

[73] 19 USC 1608.

[74] Dobbin's Distillery v. United States, 96 U.S. 395, 396, (1877); United States v. Certain Real and Personal Property, 943 F.2d 1292, 1295 (11th Cir. 1991); Scarabin v. Drug Enforcement Administration, 966 F.2d 989, 993 (5th Cir. 1992).

[75] Republic National Bank of Miami v. U.S., 506 U.S. ___, 113 S.Ct. 554 (1992). For discussion of the doctrine prior to the Supreme Court decision in the *Republic National Bank* case, see *Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of the Res*, 65 FORDHAM L. REV. 679 (1991).

[76] Department of Law Enforcement v. Real Property, 588 So.2d 957, 967 (Fla. 1991).

3. Tactical Advantages of Civil Forfeiture Seizures

At present the government enjoys a reduced burden of proof—preponderance of the evidence rather than the criminal law burden of beyond a reasonable doubt—when it utilizes civil forfeiture. This is a key advantage to civil forfeiture. *Austin v. United States*, in applying the Excessive Fines Clause of the Eighth Amendment on the grounds that civil forfeiture does involve punishment, may, in the future, have some effect as well on the reduced burden of proof available to the government in civil forfeiture.

In addition to the reduced burden of proof, civil forfeiture also provides prosecutors with a broad opportunity for discovery to compel disclosure of records rather than the limited court-approved discovery in criminal prosecutions, and may appeal an adverse decision, a possibility not permitted under criminal procedure. Perjury and contempt sanctions are potentially available against untruthful or recalcitrant witnesses. The Fifth Amendment may be asserted; but, if criminal charges are pending against the claimant, asserting the Fifth Amendment may result in an adverse inference in a subsequent civil proceeding.

Once the district court has found probable cause, the "equitable discretion" granted under the statutes[77] and confirmed by the Supreme Court is very broad, including the power to freeze the assets in question and prevent their use for any purpose, including attorneys fees.[78]

Appellate review of the probable cause finding is highly deferential to the government and the trial court. In determining whether the district court properly denied claimants' motion to suppress, this court must accept the trial court's findings of fact unless they are clearly erroneous....Furthermore, the evidence must be considered in the light most favorable to the government.[79]

However, one court has held that since the existence of probable cause is a question of law, a district Court's probable cause determination is subject to plenary review.[80]

Although the Congressional purpose behind the expansion of forfeiture authority was to permit the prosecutor to prevent the drug dealer from hiding his profits, there is every indication that the tactical advantage to the prosecution in the forfeiture procedure has resulted in its more frequent use, more than *20,000* civil and administrative forfeitures by the Department of Justice in 1989 alone.

---

[77] E.g., 21 USC 853(a).

[78] U.S. v. Monsanto, 109 S.Ct. 2657 (1989).

[79] U.S. v. $149,442.43 in U.S. Currency, 965 F.2d 868, 873 (10th Cir. 1992).

[80] U.S. v. Parcels of Land, 903 F.2d 36, 41 (1st Cir. 1990).

4. The Question of Bias

In *Marshall v. Jerrico Inc.*,[81] sums collected as civil penalties for the unlawful employment of child labor were returned to the Employment Standards Administration of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. The question for decision was whether this provision violated the due process clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration.

The District Court concluded that the reimbursement provision did create an impermissible risk of bias on the part of the Assistant Regional Administrator. The District Court found that because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, the law could distort the Assistant Regional Administrator's objectivity in assessing penalties for violations of the child labor provisions of the Act.

The Supreme Court reversed. It held the biasing influence was too remote and insubstantial to violate the constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions. However, the Court surrounded its conclusion with considerable precautionary language.

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process....

> ...We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, 'justice must satisfy the appearance of justice'....[82]

In *United States v. Good Real Property*,[83] the Court, in determining that an adversary hearing was required before seizing real property, emphasized this neutrality in decision making.

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding....[84]

---

[81] 100 S.Ct. 1610 (1980).

[82] *Ibid*, p. 1613. The Court noted it had invalidated a system in which justices of the peace were paid for issuance but not for nonissuance of search warrants, *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam), and prohibited a parole officer from making the determination whether reasonable grounds exist for the revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471, 485-486 (1972).

[83] 510 U.S. ___ (December 13, 1993).

E. Contesting the Seizure and Forfeiture

1. Standing

A claimant must establish standing to contest the forfeiture before the government agency first, and then, if necessary, in court.

Claimants must demonstrate that they have a legal interest in the property. Most courts will not permit forfeitures to be contested by persons holding bare legal title but require dominion and control as well.

[P]ossession of bare legal title by one who does not exercise dominion or control over property may be insufficient to establish standing to challenge a forfeiture. The intent of the forfeiture provision of the Controlled Substances Act is to deprive criminals of the tools by which they conduct their illegal activities. A failure to look beyond bare legal title would foster manipulation of nominal ownership to frustrate this intent....

[Once] the government establishes probable cause to believe that a claimant is merely a nominal or straw owner, ...a claimant cannot meet its burden of establishing standing to challenge a forfeiture by presenting proof of legal title alone. The claimant must also present evidence of dominion and control or other indicia of true ownership.[85]

Claimants must post a bond equal to ten percent of the value of the property. Advocates argue some people lose their property at this stage because they are unable to post the cost bond within the time limit. Procedures exist for claimants to proceed *in forma pauperis* (without paying the cost bond).[86] It is the seizing agency which has jurisdiction to rule on the validity of the *in forma pauperis* petition. If the agency rules adversely, the decision is subject to judicial appeal. However, the time and cost necessary to do so presents another obstacle to challenging a seizure and may preclude a valid claim.

At this point, after seizure but prior to forfeiture, in theory at least, the property, although seized and controlled by the government, still is not owned by the government. The property is in limbo. This loss of possession and control—where certain property or an on-going business is concerned—may cause considerable damage to the claimant. Although cash is not a deteriorating asset, its denial to an innocent owner may be extremely damaging. In sum, proceeding promptly to a forfeiture inquiry is most important to the claimant.

---

[84] *Ibid*, slip. op., p.11.

[85] United States v. Premises Known as 528 Liscum Drive, 866 F.2d 213, 217 (6th Cir. 1989). United States v. A Single Family Residence, 803 F.2d 625, 630 (11th Cir. 1986) (standing requires proof of dominion and control beyond mere legal title).

[86] 19 USC 1607, 1609, 21 USC 881(d), 21 CFR 1316.71-1316.81.

Speed of action, however, may not be to the government's interest and, if not, the government is under little time constraints to initiate a forfeiture action after seizing the property even if a claimant has contested the seizure and posted the appropriate bond.

2. Time Limitations

The government's ability to seize and proceed to forfeiture generally is liberally construed but a claimant contesting the forfeiture may find it tougher going. The period in which a claimant must register his or her intent to contest may be a fairly narrow window. This decision of whether the claimant contested the seizure in time is determined at the outset by the forfeiting government agency itself in an adversarial context which can be far from generous to the claimant,[87] and sympathetic to its own errors of omission.[88] If then a claimant challenges the seizure in court, the courts will ordinarily consider time of the essence. Even if the government sustains no appreciable damage, a claim not promptly filed is generally a claim lost.[89]

Delay by the government is more liberally construed. In *United States v. $8,850,* the Supreme Court concluded that the balancing test of *Barker v. Wingo,*[90] developed to determine when Government delay has abridged the right to a speedy trial, provides the relevant framework for determining whether the delay in filing a forfeiture action was unreasonable and may give rise to a due process claim.[91] The *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[92] Applying the *Barker* test to the facts at hand, the Court concluded an 18 month delay did not violate due process. The court noted the Government's diligent efforts in processing the petition and pursuing related criminal proceedings and that the claimant did not indicate a desire for the early commencement of civil forfeiture proceedings nor did she assert or show prejudice from the delay.[93]

---

[87] United States (Drug Enforcement Administration) v. One Jeep Wrangler, 972 F.2d 472, 481 (2d Cir. 1992)("Once the notice of claim was received, the government could not arbitrarily decide that the notice of claim, although received some 68 to 87 days after the previously abandoned forfeiture, was in response thereto and not in response to the then current seizure."); Moskovits v. Drug Enforcement Administration, 774 F.Supp. 649 (D.D.C.1991).

[88] Sammons v. Taylor, 967 F.2d 1535, 1547-548 (11th Cir. 1992)("The regulations... appear to contemplate that at least under certain conditions a claimant may be provided some notice of any inadequacy of the documents filed in connection with the claim. Here, [the government agents] apparently did not advise Sammons that his filing was inadequate—if, in fact, it was inadequate—in order to give him an opportunity to submit a corrected filing. In that regard, the following observations...are noted: 'Although the purpose of the administrative forfeiture is merely to allow the government to avoid the necessity of filing suit and obtaining a default judgment in uncontested cases, the government has been using the procedure to deny would-be claimants access to courts.... [L]aw enforcement agencies are declaring administrative limits for filing a claim and cost bond or when the agency believes that an *in forma pauperis* affidavit submitted in lieu of a cost bond is not meritorious.'

[89] United States v. Lot 65 Pine Meadow, 976 F.2d 1155, 1156-157(8th Cir. 1992) (upholding a decree of forfeiture by default for filing a verified claim and answer on August 26, 1991, instead of on August 13 when the claim should have been filed and on August 20 when the answer was due).

[90] 407 U.S. 514 (1972).

[91] 461 U.S. 563, 564 (1983). *See also,* United States v. Premises Located at Route 13, 946 F.2d 749, 754-56 (11th Cir. 1991).

In *Gonzales v. Rivkind*, a vehicle seizure case, the Eleventh Circuit held that a district court's mandate that the INS hold a probable cause hearing within 72 hours of a claimant's request was too inflexible, and that a case-by-case analysis of the *Barker* factors is required.[94] In *McCoy v. United States*, a one year and four month delay did not give rise to a due process claim, since the claimant could have cured the delay by filing suit under the Administrative Procedure Act. Further, any due process violation that may have existed was cured by the DEA finally ruling on the petition.[95]

If the judiciary has now established that the *Barker* factors determine the Constitutional due process question, how are the interlinking statutory mandates to be read? There is an overall statutory limitation on forfeiture actions of five years.[96] Thus, the customs laws also contain a series of internal requirements relating to the timing of forfeitures, a requirement that a customs agent "report immediately" to a customs officer every seizure for violation of the customs laws and every violation of the customs laws;[97] that the customs officer "report promptly" such seizures or violations to the U.S. Attorney;[98] and, finally, that the Attorney General "forthwith cause the proper proceedings to be commenced" if it appears probable that any fine, penalty, or forfeiture has been incurred.[99]

The Supreme Court in *Good Real Property* read the statute of limitations as the only mandatory restriction with the other provisions as an indication of Congressional intervention which does not, in the last analysis, limit the agency's discretion.[100]

---

[92] 407 U.S. 514, 530 (1972).

[93] 461 U.S. at 569-70.

[94] 858 F.2d 657, 662 (11th Cir. 1988).

[95] 758 F.Supp. 299, 302 (E.D.Pa. 1991).

[96] 19 USC 1621. "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." The statute of limitations is incorporated in Dept. of Justice drug enforcement via 21 USC 881(d).

[97] 19 USC 1602.

[98] 19 USC 1603.

[99] 19 USC 1604.

[100] U.S. v. Good Real Property, 510 U.S. ___, 114 S.Ct. 492, 62 U.S.L.W. 4013, 4019. (Dec. 13, 1993). In *United States v. Land and Building at 2 Burditt Street*, 924 F.2d 383 (1st Cir. 1991), a case brought prior to *Good Real Property*, the First Circuit questioned the lower court's reliance on the five-

Current Department of Treasury policy is to require its constituent agencies to proceed to forfeiture within sixty (60) days of seizure.[101] The consequences of proceeding after sixty days are unclear but after the *Good Real Property* case the sanction for not meeting the internal guideline is left to the enforcement agency discretion.[102]

3. The Innocent Owner Defense

In *Calero-Toledo v. Pearson Yacht Leasing Co*, the Puerto Rican authorities confiscated a leased vessel pursuant to civil statutes that subjected to forfeiture any conveyance used to transport or facilitate the transportation of controlled substances. Pearson Yacht Company, however, was innocent of a narcotics activity. Indeed, the company did not even learn of the yacht forfeiture until it attempted to recover possession after the lessee defaulted on the rental contract.

Could the government constitutionally forfeit an innocent party's property without just compensation? The Supreme Court answered "yes." The *Calero-Toledo* court justified forfeiture of the vessel without any compensation on historical and policy grounds that reflect the unique nature of civil forfeiture.

Most recently, Justice Kennedy questioned whether the bold holding in *Calero-Toledo* is still good law.

> At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question....[103]

---

year statute of limitations contained in the forfeiture statutes noting that the statutes prohibit forfeiture proceedings after that time, not that they can be brought at any time within five years. The court noted that "an unexplained delay of up to five years in asserting and adjudicating the existence and validity of a retroactive property taint and limbo may have due process implications." *Id.* at 385-386. The Florida Supreme Court in its review of the issue prior to *Good Real Property* states that with respect to real property it "would anticipate that the adversarial hearing will take place within ten days of the filing of the petition." With respect to personal property, the court required a postseizure adversarial preliminary hearing to be held as soon as is reasonably possible. Department of Law Enforcement v. Real Property, 588 So. 2d 957, 967 (Fla. 1991).

[101] Office of the Asst. Secy., Executive Office for Asset Forfeiture, U.S. Dept. of the Treasury, *Policy Directives*, Directive No. 5, p.1/1 (July, 1993).

[102] U.S. v. Good Real Property, 510 U.S. ___, 114 S.Ct. 492, 62 U.S.L.W. at 4019. (Dec. 13, 1993).

[103] Austin v. United States, 509 U.S. ___, 113 S.Ct. 2108, 125 L.Ed.2d 488,510 (1993). (Concurring opinion of Justice Kennedy joined by the Chief Justice and Justice Thomas.)

a. Lack of Knowledge/Lack of Consent

Regardless of the constitutional situation, the innocent-owner defense, as codified, states that property will not be forfeited when the illegal act occurs "without the knowledge or consent of that owner."[104]

The innocent owner amendment to section 881(a)(4) was introduced in the House without the terms "willful blindness," and only required the owner to establish his lack of "knowledge or consent."[105] During debate, some Representatives complained that the original bill "would lead to a 'look-the-other-way' defense,"[106] and that "owners will be encouraged...to know as little about their property as possible...."[107] The bill was later amended to include the "willful blindness" language.[108]

Rep. Jones described the new provision as "virtually identical to the existing defenses [in 21 USC Sec. 881(a)(6) and (a)(7)]...except that the concept of willful blindness is incorporated." This is intended to prevent the owner of a conveyance from closing his eyes to a violation.[109]

Courts are divided as to whether in establishing the innocent owner defense the claimant must show by a preponderance of the evidence that the illegal activity took place on the property both without his lack of knowledge *and* lack of consent; or whether even if a claimant has actual knowledge, the claimant may avoid forfeiture by establishing lack of consent.[110] Most courts have construed the forfeiture provisions to allow the innocent owner defense if the claimant can establish *either* his lack of knowledge *or* his lack of consent.[111] The National

---

[104] 21 USC § 881(a)(6) & (7) (1992). These sections define innocent owner defenses with respect to real estate and other property. In 1988, Congress amended the drug forfeiture statute, 21 USC §881, to extend the "innocent owner" defense to owners of aircraft, vehicles, and vessels. This section now provides for relief for acts or omissions committed or omitted "without the knowledge, consent or willful blindness of the owner." 21 USC § 881(a)(4)(C). The Eighth Circuit has interpreted the "willful blindness" standard as a way of inferring knowledge. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1174-75 (8th Cir. 1992).

[105] 134 *Cong. Rec.* 22,653, 22,672.

[106] 134 *Cong. Rec.* 24,086 (statement of Rep. Archer).

[107] *Ibid*, (statement of Rep. Gibbons).

[108] 134 *Cong. Rec.* at 33,193.

[109] In *Mattingly v. United States*, 924 F.2d 785, 792 (8th Cir., 1991), a civil tax fraud case, the Eighth Circuit stated that knowledge may be inferred when a person deliberately closes his eyes to the existence of facts that would otherwise be obvious or demonstrates a conscious purpose to avoid enlightenment.

[110] *See*, 141st Street Corp., 911 F.2d at 877-878 (collecting cases); United States v. 8848 South Commercial Street, Chicago, Ill., 757 F.Supp. 871, 886 (N.D. Ill. 1990) (discussion of various circuits' positions).

[111] *See, e.g.*, United States v. Real Property Located at Section 18, 976 F.2d 515, 520 (9th Cir. 1992); *United States v. 141st Corp.*, 911 F.2d 870, 878-79 (2d Cir. 1990), (allowing lack of consent defense to owner who did all that could reasonably be expected to prevent the illegal activity), *cert. denied*, 111 S. Ct. 1017 (1991); United States v. 6109 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989) (holding that

Association of Criminal Defense Lawyers has asked the Congress to correct this legislatively.[112]

b. Reasonable Precautions to Prevent the Violations

Many courts have added an additional requirement to the statutory innocent owner defense, relying on the *dicta* in the *Calero-Toledo* case. Justice Brennan observed in *Calero-Toledo*, while holding there was no constitutional violation, that Pearson Yacht Leasing Co., the innocent owner, voluntarily entrusted the vessel to the lessees and that "no allegation [had] been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."

Relying on Justice Brennan's language but reversing its import, some courts, like the Department of Justice, have demanded that an innocent owner prove that he is entirely free of any involvement in or knowledge of the unlawful conduct and also meet the *Calero-Toledo* test;[113] namely, that they demonstrate that he took all reasonable precautions to prevent the violation, in order to avoid forfeiture.[114]

Other courts have avoided the issue. The Eleventh Circuit's response when faced with the issue typifies the judicial confusion over the conflict between section 881, actual-knowledge standard and *Calero-Toledo*'s reasonable precautions standard. In *United States v. $4,255,000*,[115] the Eleventh Circuit left "for another day the question of the applicability of the *Calero-Toledo* dicta to forfeiture actions under 21 USC section 881(a)(6)."[116]

A donee may claim to be an innocent owner[117] and the innocent owner defense applies to interests purportedly acquired after the commission of the trigger offense, the time at which the government's title to the property vests.

F. Equitable Sharing

As part of the Comprehensive Crime Control Act of 1984, Congress mandated that forfeited assets would no longer go into the general Treasury.

---

claimant can prove innocent ownership by establishing that the illegal use occurred either without her knowledge or without her consent).

[112] Testimony of Nancy Hollander, Esq., on behalf of the National Association of Criminal defense Lawyers given before the House Committee on Government Operations, Legislation and National Security Subcommittee (June 22, 1993).

[113] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974).

[114] United States v. One 1983 Homemade Vessel Named Barracuda, 858 F.2d 643, 647 (11th Cir. 1988). *See also, e.g.*, United States v. One (1) 1982 28' Int'l Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984); United States v. One (1) Cessna Model 210L Aircraft, 890 F.2d 77 (8th Cir. 1989).

[115] 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

[116] *Id.* at 906 n.24.

[117] United States v. A Parcel of Land Known as 92 Buena Vista Avenue, 112 S.Ct. 1260 (1992).

Instead, the property (or the money derived from its sale) is allocated exclusively for law enforcement purposes.[118] In addition, the Department of Justice gained authority to transfer forfeited property and cash to state and local agencies that directly participate in law enforcement efforts leading to seizures and forfeitures. The Customs Bureau similarly has authority to share forfeited assets.[119] The applicable statutes do not set out any restrictions on the equity sharing program nor does it address how state and local agencies are to use shared assets.

1. Purpose of the Program

The Department of Justice's guidelines state the program's goals are three, including raising money:[120]

> (1) to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities;
> (2) to enhance cooperation among foreign, federal, state and local law enforcement agencies through the equitable sharing of assets recovered through this program; and, as a by-product;
> (3) to produce revenues to enhance forfeitures and strengthen law enforcement.

The conflict of interest issue we noted earlier affects the asset sharing program. The Supreme Court commented: "...it makes sense to scrutinize governmental action more closely when the State stands to benefit."[121] Critics have noted the extent of the practice:

> ...[M]any prosecutors' offices are also being heavily funded with forfeiture revenues. So not only police agencies but even prosecutors are in thrall to a reward system that resembles bounty-hunting.[122]

The asset sharing program is large and growing very rapidly both in the number of participating local agencies and amount of funds. Forfeited assets can be cash and bank accounts or property such as automobiles, boats, airplanes, jewelry, art objects, or real estate. Thus, the Department of Justice asset sharing program shared over $736 million in cash and $90 million in property with state and local agencies from the start of the program in fiscal year 1986 through fiscal year 1991. In fiscal year 1991, the Justice Department total exceeded $284 million; and in Fiscal Year 1992, the total sum was $242 billion.[123] Over 3,000 state and local agencies have participated in the Justice asset sharing program, the largest number in California, Florida, New York, and Texas. Although state and local agencies may receive property, the shared distributions have mainly been forfeited cash or the cash proceeds of forfeited property sold by the Marshals Service or Customs.

---

[118] 28 USC 524.

[119] 19 USC sec. 1616a (c)(1) and (2) (1993).

[120] Dept. of Justice, *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990), p.3.

[121] Harmelin v. Michigan, 501 U.S. 2680, ____, 111 S.Ct. 2680, 2693, n.9 (1991).

[122] Statement of David Smith Before the House Committee on the Judiciary, Subcomm. on Economic and Commercial Law (July 28, 1992).

Most sharing results from joint investigations, those in which the Federal law investigative agencies work with state or local law enforcement agencies or foreign countries, to enforce Federal criminal law and the investigation or prosecution results in a federal forfeiture.[124] The non-Federal agency may request an equitable share of the net proceeds of the forfeiture.

In addition, a state or local law enforcement agency, or foreign country, that has seized property may request that one of the Treasury investigative agencies (Customs Service, Internal Revenue Service, Secret Service, or Bureau of Alcohol, Tobacco & Firearms) adopt the seizure and proceed with forfeiture. State and local law enforcement agencies may have at least three incentives for the adoptive forfeiture: (1) federal administrative forfeiture may be faster; (2) federal law often permits forfeitures not permitted under state law; and (3) federal law often permits a more generous share for the state or local law enforcement agency than state law.

The agencies of the U.S. Treasury, for example, may adopt the seized property for forfeiture where the conduct giving rise to the seizure is in violation of Federal law enforced by Treasury. The request for the adoption of the seizure must be made within thirty (30) calendar days of the date the property was originally seized and the equity in the property must exceed various dollar amounts.[125]

---

[123] Executive Office for Asset Forfeiture, *Annual Report of the Department of Justice Asset Forfeiture Program* (1992), p.30.

[124] The text describes the Department of Treasury practice as set out in that Department's program guidelines. *See*, Dept. of Treasury, *Guide to Equitable Sharing for Foreign Countries and Federal, State Local Law Enforcement Agencies* (July 1993 draft). The Dept. of Justice guidelines are in revision but it is expected to follow the same pattern as Treasury.

[125] Conveyances:

Vehicles—$3,500
Vessels—$10,000
Aircraft—$10,000
Real Property—land and any improvements—$20,000 or 20% of the appraised value.
All other property—currency, bank accounts, monetary instruments, jewelry, etc.—$2,000.

These thresholds may be waived where forfeiture will serve a compelling law enforcement interest; e.g., forfeiture of a vehicle, vessel or aircraft outfitted for the smuggling of drugs.

The only apparent restriction on the Attorney General's discretion in the area of equitable sharing with state and local law enforcement agencies is the requirement that she determine that the amount to be shared is proportionate to the recipient's contribution to the forfeiture and that the transfer will encourage federal-state law enforcement cooperation. Treasury determines the local agency participation normally by comparing the number of local agency hours to the time of the seizing agency's officials.

The Treasury share in *adoptive* cases is based on a "flat rate" of the net proceeds; either 20% if 100% of the pre/seizure activity was performed by a local agency or 10% where 100% of the pre/seizure activity was performed by a non-Treasury Federal law enforcement agency.

In all[126] forfeiture cases under its jurisdiction, either judicial or administrative, Treasury determines the amount of the equitable share.

Justice and Treasury have not routinely monitored the use by local government of shared assets but depended on reporting. In some cases Justice and Treasury have learned of actual or planned misuses of shared assets and have written letters to law enforcement agencies and governing bodies threatening not to share with them in the future unless they stop the inappropriate uses.

Local law enforcement officials reported that sharing not only has increased the resources they have available to fight crime but also has helped support programs that would have been impossible to support without sharing.

2. Proposed Limitations

Nevertheless, the propriety of a system which would directly benefit financially the prosecution has been queried by the courts[127] and academics and has given rise to a variety of reform suggestions. NCCUSL in its proposed draft[128] provided three alternatives. Its preferred alternative recommended varying from federal law and MASFA and requiring that forfeited property be deposited in the general State or local treasury and be subject to ordinary local legislative appropriation. Both federal law and MASFA earmark these funds for law enforcement use.[129] The NCCUSL alternative takes the position that giving seizing agencies direct financial incentives in forfeiture is an unsound policy that risks skewing enforcement priorities.[130]

---

[126] There is an exception for foreign sharing requests or real property.

[127] United States v. That Certain Real Property, 798 F.Supp. 1540, 1551 (N.D. Ala. 1992); Jones v. Drug Enforcement Administration, No. 3:91-0520, slip op. 62 (M.D. Tenn. April 21, 1993) (fact that local law enforcement agencies have a direct financial interest in the forfeiture creates dangerous potential for abuse and requires heightened scrutiny by the courts); United States v. Currency, In the Amount of $150,660.00, 980 F.2d 1200, 1208 (8th Cir. 1992) (Bright, J. dissenting) (court should not find probable cause based on opinion of police officer that cash smelled of marijuana when his department would receive a direct financial benefit from the forfeiture).

[128] *See* 522, NCCUSL model.

[129] 28 USC Sec. 524; MASFA Sec. 16.

NCCUSL recognized that many States have "earmarked" or restricted the utilization of the proceeds of forfeitures. Accordingly, the Conference on Uniform State Laws offers two additional alternatives in its draft.

The first alternative, similar to 28 USC section 524(c), ensures continuing legislative oversight and control over the actual utilization of the proceeds of forfeitures, but nonetheless "earmarks" such proceeds for purposes relating to the enforcement and implementation of the Uniform Controlled Substances Act. Under this alternative the State legislature or local governing body determines how funds will be allocated and the specific purposes for which the funds may be used. The use of funds is restricted to purposes relating to the administration and enforcement of the Uniform Controlled Substances Act, but is not limited to appropriations made directly to law enforcement agencies. Accordingly, although not specifically itemized in the alternative, such funds could be used for prison construction, crime victims' compensation, public defenders, and drug addiction treatment and rehabilitation costs.

The final alternative dedicates forfeiture proceeds exclusively for drug law enforcement activities and exempts the utilization and control of these funds from the ordinary legislative process. Many State and local prosecutors favor this alternative in order to ensure access to additional resources to finance the "war on drugs." This alternative is based upon the rationale that the fruits of illegal drug activity should be used directly to counter such activity and that public purposes served by such expenditures are so great as to justify circumventing the ordinary appropriation process.

V. Recommendations

Recommendation 1. *Establishment of an Administrative Tribunal to Adjudicate the Act of Forfeiture*

After the seizure, the taking of property, the act of forfeiture, at present is a ministerial act conducted within the agency which carried out the seizure. Usually, a paralegal or a relatively low-level official examines the file and writes up a forfeiture action, generally parroting the seizure findings. The forfeiture action document then is reviewed and signed by a high-level law enforcement official within the agency. Throughout the process, from the decision to seize to the decision to forfeit, no one outside the agency has seen the file or, indeed, has the authority to see the file. The thrust of this recommendation is to change this procedure by requiring that before the act of forfeiture takes place—before an irrevocable act divesting a person of ownership of property but after seizure—the agency *must* proceed outside its own confines. The agency must obtain a decision by an independent authority or tribunal in order to forfeit the property.

---

[130] *Cf.* Connally v. Georgia, 429 U.S. 245 (1977) (declaring unconstitutional a system whereby unsalaried justice of peace received $5 for each issued search warrant but nothing for refusing to issue a warrant): Harmelin v. Michigan, 111 S. Ct. 2680, 2693 n.9 (1991) (opinion of Scalia, J.) (Eighth Amendment may demand more careful scrutiny of fines than terms of imprisonment because "fines are a source of revenue").

As a corollary, there are a number of other questions that the agency must address at this stage and satisfy the tribunal even if the seizure and subsequent forfeiture is uncontested. They are:

a. The propriety of the seizure, whether the seized property was properly seized, whether proper procedures were used, including an examination of the evidence establishing probable cause for the seizure itself.

b. Whether the property seized is proportionate to the criminal offense involved.

c. Whether proper notice was given of the intent to forfeit.[131]

d. If requested by the claimant, whether remission or mitigation is appropriate in this case. At present, remission and mitigation are both regarded as acts of grace[132] by the administrative agency and are kept within the agency's own confines. Since we are recommending an administrative tribunal that will in the normal course review seizure and forfeiture actions, it is appropriate that remission and mitigation questions be decided at the same time by this tribunal.

e. Whether it is likely that the law enforcement agency will proceed to bring criminal action against the owners or related actors to the forfeited property. Asset forfeiture is part of a law enforcement effort directed at criminal activity and criminal prosecution of malefactors. There are frequent public charges that the agency seeks only to seize and never intended a forfeiture or a criminal prosecution.[133] It may be, of course, that there were good reasons not to proceed to bring an indictment. This recommendation seeks to require the agency to address this question.

---

[131] Notice of civil forfeiture can be given when a proceeding is initiated, notice of criminal forfeiture cannot be given until after a criminal conviction. United States v. Tit's Cocktail Lounge, 873 F.2d 141 (7th Cir. 1989).

[132] The current federal remission statute is found at 19 USC sec. 1618. It permits the Secretary of the Treasury to remit or mitigate a forfeiture if he finds the forfeiture was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify" remission or mitigation. 19 USC sec. 1618 (1992).

[133] If a criminal conviction has been obtained or where the claimant pled guilty, the civil forfeiture action may still be contested. The general rule is that only matters necessarily decided in the prior action are barred from relitigation by collateral estoppel. Issues concerning the land or property's character or its use in facilitating the crime of drug manufacture may still be litigated. United States v. Real Property Located at Section 18, 976 F.2d 515 (9th Cir. 1992).

There is an additional reason for a required public act of forfeiture in all cases. The government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. Further, it cannot profit from the statutory version of that doctrine in section 881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense under section 881(a)(6).[134] The establishment of the date from which the property is contaminated openly by an objective, public authority will avoid embarrassment and disputes about ownership and control of the property, especially with banks and other financial institutions.

Recommendation 2. *Establishment of a Forfeiture Registry*

The establishment of a Forfeiture Registry would perform three functions.

a. First, it would be a place, like the *Federal Register*, where forfeiture notices not only could be published but it would be the one medium through which all notices of forfeiture could be given. This would eliminate issues which arise, from time to time, as to whether the place of publication—sometimes coupled with a letter addressed to the last registered address of the owner of the property—was adequate. Thus, in *U.S. (Drug Enforcement Agency) v. One 1987 Jeep Wrangler*:[135]

> The DEA claims to have served a Notice of Seizure upon the appellant on this date and to have advertised the seizure on May 29, 1991 in a national daily newspaper. Appellant contests the existence of these notices and the record contains no actual proof of either.[136]

b. Second, it will assure on a continuing basis that the details of the forfeiture, the nature of the property forfeited (real vs. personal) and amount are all subject to public view. Except for annual reports on an aggregate level, access is not available for outsiders to determine the true impact of the forfeiture process. Are there many cases where the seizure was inappropriate and, nevertheless, the government agency staff proposed a forfeiture action? How many mistakes are in fact made? How much discretion is abused and how much not? Abuse of discretion may exist more in the public mind than in reality. This perception can be easily avoided by a centralized, uniform process where seizures can be exposed before final forfeiture.

---

[134] United States v. Parcel of Land, 507 U.S. ___; 122 L.Ed. 2d 469 (1992).
[135] 972 F.2d 472 (2nd Cir. 1992).
[136] *Ibid* at 475.

Recommendation 3. *Establish Time Limits After Seizure for Forfeiture and Remission Decisions*

Congress should amend the federal forfeiture statutes to require the government to commence any administrative forfeiture action (by providing notice to the owner of the seized property and intent to forfeit) within *sixty* (60) days of the seizure. If judicial forfeiture action is required, the statute should also require the government to commence the action in district court within *sixty* (60) days of receipt of the claim.

Some time limitation is generally accepted. Current DOJ policy is sixty (60) days. MASFA allows the government 90 days to initiate forfeiture proceedings after which if public claim has been filed the property must be returned. NCCUSL also provides 90 days. The ACLU provides 30 days. Conyers and Hyde do not consider this issue.

Under this recommendation, if the government agency fails to file a forfeiture action within 60 days, the seizure action should be nullified and the property returned to the original owner. Under the MASFA statute, in the absence of the government proceeding to forfeiture, the government retains the property unless requested that it be returned. It is believed that seizures without proceeding to forfeiture should have greater consequence.

Recommendation 4. *Restriction on Federal Adoption or Equitable Sharing*

State or local officials may request the Federal government to adopt a case as their own and proceed to forfeit the property. Once that adoption takes place, the normal State law governing the seizure is supplemented by Federal law. As a result, under Federal law proceeds from forfeited property may be returned to state and local law enforcement officials who first seized the property rather than returned, according to state law, to the local general treasury.

This is questionable. It is not desirable to forge a doctrine that as a key element results in the avoidance of State law. Therefore, the adoption should be permitted only if there is a law enforcement purpose; e.g., where Federal officials could handle the case better than local officials. If that is not true, then the adoption process should not be given effect.

The distribution of the proceeds of the forfeiture should proceed via State law without any priority accorded to the referring local law enforcement agency. The special administrative tribunal will decide whether the adoption process was valid under this standard.

MASFA basically codifies the existing practice. The bill creates a Special Asset Forfeiture Fund in which all monies obtained pursuant to the Act are to be deposited. Property or monies in the fund are to be distributed to the appropriate local, state, or law enforcement or prosecutorial agency (after satisfaction of any exempt security interest or lien and after expenses) so as to reflect the agency's contribution to the seizure or forfeiture of property or deposit of monies into the fund. Monies from the fund are not subject to appropriations restraints and may not supplant other local, state, or federal funds.

NCCUSL and ACLU allows transfer of a portion of the proceeds to the state to the extent of either the agency's participation in the activity leading to forfeiture or the conduct giving rise to forfeiture that occurred in that state.[137] Remaining funds are to be deposited in the general state treasury and subject to ordinary legislative appropriation. When the disposition of forfeited property is governed by a specific state law, the attorney for the state shall dispose of the property in accordance with that law.

The Conyers bill provides that one-half of the Department of Justice Asset Forfeiture Fund be used for community-based crime control programs, with the distribution to the various communities to be determined by the states.[138] The bill also mandates that seized low value real property be offered for sale to tax exempt organizations that provide direct services furthering crime control, housing or education efforts.

The Hyde bill removes the qualification that funds in the Department of Justice Asset Forfeiture Fund be used only for "law enforcement" purposes.[139]

Recommendation 5. *Restrictions on Seizures of Residences and On-going Business.*

The seizure of residences and on-going businesses raises special questions. The government is not a good manager and business and residences, if seized, even for a short period of time, can suffer irreparable damage. Abuses, which are, admittedly few, have been exceptionally destructive where residences and on-going businesses were involved. It is recommended that actual, physical seizure of this property should not be permitted until the government has proved in a forfeiture proceeding before an independent tribunal the propriety of its action. Notice of lien should be sufficient.[140] This recommendation is supported by such unlikely allies as American Prosecutors Research Institute,[141] and Cong.

---

[137] NCCUSL sec. 518(d).

[138] H.R. 2774, 102d Cong., 1st Sess., sec. 1(1991).

[139] H.R. 2417, 103d Cong., 1st Sess., sec. 7 (1993).

[140] United States v. Property at 4492 S. Livonia Road, Livonia, 889 F.2d 1258 (2nd Cir. 1989).

[141] Model Asset Seizure and Forfeiture Act of 1991 (Sec. 6(c)).

Conyers.[142] The rule suggested would prevent improper sale of property either inadvertently or as a result of an excess of zeal.[143]

Since seizures of residences and businesses do invade in a special way private interests, the public has a special interest in assuring the prosecuting agency has an immediate criminal process at hand. Residences and on-going businesses should not be forfeited without an indictment against the actual owner or beneficial owner of the residence or business.

Recommendation 6. *Property Should Be Exempt from Forfeiture if the Interest Holder Did Not Know or Acted Reasonably to Prevent Illegal Conduct.*

All of the proposed bills address this question. MASFA exempts the property from forfeiture if the owner or interest holder acquired the property before or during the conduct giving rise to its forfeiture, and, in addition, the owner (1) did not know and could not reasonably have known of the act or omission or that it was likely to occur; or (2) acted reasonably to prevent the conduct giving rise to forfeiture.[144] In addition, the property is exempt if the owner or interest holder acquired the property after the conduct giving rise to its forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and he acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.[145]

The NCCUSL, in addition to the MASFA defense based on knowledge, provides that the interest in the property is exempt from seizure regardless of knowledge if the owner or secured interest holder acted reasonably to attempt to prevent the conduct[146] and if the owner gave value for the property. The ACLU has a provision similar to the NCCUSL draft.

The Hyde bill confers innocent owner status on one who can establish that the illegal activity occurred "either without the knowledge of that owner or without the consent of that owner."[147]

NCCUSL has focused as well on the question of legal fees. NCCUSL generally provides for an exemption for lawyers who acquire an interest in the property as reasonable payment for legal services in a criminal matter earned before the lawyer learned of a judicial determination of probable cause that the property is subject to forfeiture and who did not have actual knowledge, at the time the interest was acquired, that the illegal conduct had occurred.[148]

---

[142] The Civil Asset Forfeiture bill.

[143] United States v. Certain Real and Personal Property, 943 F.2d 1292 (11th Cir. 1991).

[144] MASFA sec. 5(a)(1)(i) & (ii).

[145] *Id.*, sec. 5(a)(2).

[146] *Id.*, sec. 504(a)(1)(i)(B).

[147] H.R. 2417, 103d Cong., 1st Sess., sec. 8 (1993).

[148] *Id.*, sec. 504(3).

Report for Recommendation 95-1

Reexamining the Freedom of Information Act's Exemption [8]

Roy A. Schotland
Professor of Law
Georgetown University Law Center

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

I. INTRODUCTION AND SUMMARY 215
II. AT THE AGENCIES 221
  A. Bank Examinations: Purposes, Kinds of Information 221
  B. Practice on Confidentiality 227
  C. The Agencies' Experience with [8] 230
  D. State Agencies' Experience 232
III. BANK EXAMINATIONS IN THE CONGRESS 237
  A. Independent of FOIA 237
  B. [8]'s Legislative History 238
  C. Since FOIA's Original Enactment 248
IV. COMPARING BANK EXAM REPORTS' FOIA UNAVAILABILITY WITH AVAILABILITY OF OTHER AGENCIES' INSPECTION REPORTS 255
V. CHANGES IN PUBLIC INFORMATION ABOUT BANKS 260
  A. Securities Disclosure Requirements 263
VI. BANK EXAM REPORTS IN THE COURTS 268
  A. FOIA cases involving [8] 268
  B. Non-FOIA Cases, Involving Discovery of Exam Reports 271
VII. BANK EXAMINATIONS GO PUBLIC: THREE EPISODES 274
VIII. OTHER MATTERS 275
  A. Should CAMEL Ratings Be Disclosable? 275
  B. Agency Records Other Than Exam Reports 277
  C. What of Closed Banks? 278
IX. NEW SAFEGUARD AGAINST REGULATORY LAXNESS: REVIEW BY IGS 280
X. SHOULD [8] BE REPEALED OR AMENDED? IF IT WERE, HOW MUCH DIFFERENCE WOULD THAT MAKE? 288
  A. Scholarly Commentary 288
  B. [8] in Relationship to Exemptions (4), (5), (6) and (7) 290
XI. CONCLUSIONS AND RECOMMENDATIONS 294
APPENDICES 302

I. Introduction and Summary

Since FOIA's enactment in 1966, exemption (8) (hereafter, "[8]") has been unchanged:

> [These disclosure provisions] do not apply to matters that are—...(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions[.]

Although [8]'s words are unchanged, there have been efforts to amend it. In 1989, the Community Reinvestment Act of 1977 (CRA) was amended to mandate disclosure of information—from bank examination reports—about compliance with CRA, a statute aimed at encouraging provision of credit to low- and moderate-income neighborhoods. That CRA amendment was enacted after an effort in the House to amend [8] by lifting the exemption not merely with respect to CRA but more broadly. So although [8]'s words are unchanged, there has been relevant change in another statute, just as is true of other aspects of FOIA. And as recently as 1992, the Senate gave broad support to a bill to amend [8] to remove the exemption for bank examination reports on failed banks.[1]

Efforts to amend or narrow [8] have centered mainly on the following issues. It has been urged that examination reports should not be exempt as to—

1) Banks that are closed or have received financial assistance from the FDIC or FSLIC.

2) Information about performance under any statute designed (a) to prevent discriminatory lending practices based on race or gender; or (b) to promote Truth in Lending or similar policies that do not bear upon the bank's safety and soundness.

---

[1] "Banks," for the sake of brevity in this Report, refers to both banks and thrift institutions, unless otherwise indicated.

Also, examination information is the focus of this Report. Though [8] covers not only exam reports but also operating and condition reports (quarterly statements of income and expense, and of assets and liabilities), much of which are routinely public, the non-public parts of those latter reports have information that is from exam reports or very similar to such information, and thus can be grouped with "exam reports." It would be appropriate to amend [8] to bring it precisely into line with the current practice on operating and condition reports, but such an amendment would effect no actual change in practice, and so can await a general modernizing of FOIA.

Information other than that in (or similar to) exam reports, is considered further in §VIII.B.

3) Any matter that falls outside the generally applicable exemption (4)[2] It is argued that, given FOIA's basic purpose, it is not appropriate to make any special restriction on "commercial and financial information."

4) Less frequently, there has been disagreement over whether a particular agency or institution is "an agency responsible for regulation or supervision."

5) Last, and with special force in recent years, is the further argument bearing on the first issue above but not limited to that: At least since the emergence of our extraordinarily costly problems with many savings and loans and banks, it has been argued forcefully that the public interest requires fuller disclosure of examination report information, for two reasons: (a) to provide the public with fuller information about problem situations, and (b) to increase the accountability of the banking regulators. Such arguments, and efforts to implement such views, were energetically pressed by then-Senator Timothy Wirth (D. Colo.), who in 1991-92 secured broad Senate support for his bill.

In what context shall we view such issues, in thinking about what is "the public interest" here? Discussions over the last eleven months[3] at meetings of the ACUS Committee and with Committee members, agency personnel, banking lawyers, FOIA users, etc., have seemed to me to assume a tripartite context: FOIA requesters, the agencies, and the banks that are either submitters of, or the subject of, agency records. It seems to me important to keep in mind the full congeries of interests or "players"—an unusually full array—involved here. First, in addition to the usual responsibility for protecting the public interests within the agencies' delegated authority, the banking agencies not only regulate but also "supervise," i.e., have a perhaps uniquely close involvement with the regulated firms; that supervisory authority exists because banks have a truly unique and central role in the economy; and in addition to regulation and supervision there is the responsibility to protect the deposit insurance fund. Second, banks, like any other private firms, are a cluster of interests: 1) insured depositors; 2) uninsured depositors, 3) bond-holders and other creditors; 4) borrowers, 5) bank personnel; and 6) stockholders.

As in any such situation, interests both converge and conflict. FOIA, for me, is a statute whose contributions hugely outweigh its costs, whether in dollars or otherwise. But whatever one's view of FOIA,[4] one cannot assume that FOIA requesters aim only at holding government accountable. For example, FDA's massive volume of FOIA requests is well known to include frequent, routine efforts by regulated firms to learn about their competitors; that is understandable in the FDA setting of constant filings for new drug and similar applications. I doubt that banks would have similar incentives to file FOIA requests about their banking competitors. But the fact that banks are uniquely vulnerable to bad news and rumors, because of the volatility of their deposits, makes me expect that repeal of [8] may unleash a panoply of problematic uses of FOIA by investors, short-sellers, media, frustrated borrowers and perhaps some competitors. While a speculative risk of such problematic uses would not, standing alone, support keeping [8] in the law, it seems worth taking into account.

---

[2] Exemption (4) is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Discussion of how [8] relates to exemptions (4), (5), (6) and (7) is below in §X.B.

[3] The first draft of this Report was submitted October 1, 1993; it was referred to the Rulemaking Committee a few months later.

[4] *See e.g.*, Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, March/April 1982 at 14, 15: (FOIA is "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored.").

Of course any such "separating Cain from Abel when it comes to FOIA requesters" in order to disfavor requesters whose purpose is anything other than holding government accountable, is not the approach of the statute—agencies are not authorized to withhold records because of their judgment about how the requester might use them. But the Court is now disfavoring purposes other than holding government accountable, *Dep't. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989), with "an enormous impact on FOIA jurisprudence," see e.g. *Dep't. of Defense v. F.L.R.A.,* 114 S.Ct. 1006 (1994).[5] Like other strong believers in FOIA, I disagree totally with this latest decision narrowing FOIA[6]; but I see no gain in trying to amend the statute in a way that will most likely unleash requests which in the main (and perhaps overwhelmingly) will be just the type that seems to be pushing the courts toward constricting FOIA. Given all the information publicly available on banks and thus on their regulation (see §V), and given the defiantly detailed quality of exam reports and similar information, I conclude that there is neither need for a FOIA free of [8] to enhance accountability nor likelihood that it would, but large likelihood that such an amendment would bring undesired problems.

Coming to how [8] has fared in the courts: 21 FOIA cases, starting with a 1978 watershed decision from the D.C. Circuit, reflect efforts to secure information despite [8]. As was said in a concurring opinion in that 1978 case, [8] does not "[sit] entirely comfortably with the broad thrust of the FOIA...." Nonetheless, [8] has proven a clear and simple barrier to disclosure; indeed, there are fewer cases about [8] than about any other exemption except (9).[7]

---

[5] The first quotation is from James T. O'Reilly, letter to author, Aug. 29, 1994. The second is from his June 1994 Supplement to his FEDERAL INFORMATION DISCLOSURE (2d ed.), vol. 2, at 25-31. The O'Reilly letter commenting on the paragraph in text above, included this: "The 'unleash[ing of] a panoply of problematic use[r]s' like locusts upon all other regulated entities is a fact of life. Ability of others to cash in on FOIA's value as a method of gaining commercial intelligence has not chastened the press, or made the press less supportive of FOIA. The press, bemused by the ancillary tag-along commercial requester whose use now dwarfs that of the press, does not object. The role that FOIA can play is what the Old Testament called one prophet, 'the afflicter of the comfortable.' I'm a for-prophet advocate!"

[6] Since the Court's first FOIA case, *EPA v. Mink,* 410 U.S. 73 (1973)—which decided against disclosure and was overruled by Congress as part of the 1974 amendments to FOIA—the Court has decided against disclosure another 24 times, for disclosure five times. (Three other cases cannot be so flatly categorized: *Chrysler Corp. v. Brown,* 441 U.S. 281 (1979); *NLRB v. Sears, Roebuck,* 421 U.S. 132 (1975); and *Renegotiation Bd. v. Bannercroft Clothing Co.,* 415 U.S. 1 (1974).)

In addition to those FOIA cases, a distinguishable but larger body of cases deals with efforts to discover information from exam reports, in the course of lawsuits involving banks. The results in those cases, more varied than in the FOIA cases, are considered below. Does the fact that in some cases examination information is found discoverable, suggest there should also be more availability under FOIA? I believe not, because of four distinctions set forth below, §VI.B.

As for the agencies themselves: Data are presented (Appendix 3) on the number of FOIA requests and denials at the Federal Deposit Insurance Corp. (FDIC), Federal Reserve Board (FRB or Fed), Office of the Comptroller of the Currency (OCC), and Office of Thrift Supervision (OTS); on those agencies' denials, wholly or partly, based on [8]; and on their appeals. Here noting only the data for 1992: the four agencies received 30,434 total FOIA requests; denials totaled 1,303, of which 35% involved [8]. There were 156 internal agency appeals involving [8]; in 97 of those, denials were reversed or modified.

As for agency practice: "The policy of protecting confidentiality of examination reports goes back over 125 years to the establishment of the national banking system."[8]

In line with the agencies' steadfast official insistence on the importance of preserving the confidentiality of examination reports—even, e.g., to the extent of unusual safeguards surrounding how GAO conducts oversight audits pursuant to a 1982 statute, see §III.A.—interviews with agency personnel produced uniform, unqualified opposition to any change "relaxing" [8] in any way. Among practitioners and other interested persons, somewhat more diverse views were found, unsurprisingly. The effort to gather views of persons most likely to differ from officials' views, included a questionnaire (see appendix 4) sent to the 50 persons whose 1993 FOIA requests to the Federal Reserve Board had been denied (wholly or partly) because of [8].

Summary Conclusions and Recommendations

The author recommends that [8] should not be amended, for 10 reasons:

1. The gains from public availability of exam reports and related information is marginal at best. Unlike earlier eras, the soundness and operating

---

[7] The exemption provided by (9) is for "geological and geophysical information and data, including maps, concerning wells." The number of cases on [8] is about one-quarter of the next more litigated exemption. *See* Dept. of Justice, *Freedom of Information Act Guide & Privacy Act Overview* (Sept. 1992 ed.), 218-20.

[8] OCC, Historical Overview, 1 (undated internal memorandum on file with author).

performance of banks are the subject of mountains of data made publicly available, routinely and readily, pursuant to the requirements of regulatory and securities laws.

Further, such data are incomparably more reliable for public comprehension of any specific bank or group of banks—or for evaluation of regulatory performance—than are raw exam reports and similar information. The routinely available data are also incomparably more useful for comparability among banks, because purposefully compiled and designed for such use. And without comparability, query whether there is any comprehensibility.

2. As for the gains that public availability of exam reports might bring by rendering bank examiners and regulators more accountable: The case for accountability is obvious, the question is whether this step would help. I believe it would not, because:

(a) If exam reports were publicly available, they would be written differently.

(b) Given the bank-specific information already publicly available—from which robust and full inferences may be made about regulatory supervision of each bank—would more than marginal enhancement be added by FOIA-availability of exam reports?

(c) Exam information is bank-specific. Accountability is better promoted by focus on the adequacy of the regulators' overall approach, systems and methods of implementation, and regulations and policies.

(d) To the extent that review of bank-specific information may throw light on regulatory performance, among the most illuminating situations are bank failures. Since 1993 we have, pursuant to 1991's FDIC Improvement Act ("FDICIA"), mandated review of such situations by the relevant agency's Inspector General (see §IX below). Useful as is such a step, many observers might seek more public review, a view with which I agree. But FOIA is an inefficient and insufficient mode of securing such further review; I suggest instead more systematic outside review (below).

3. Any bank about which exam information is released, faces several risks:

(a) The most familiar concern is "a run on the bank" by ordinary depositors.

(b) No attention has been given to the modern versions of that familiar concern: access to credit from other banks in the federal funds market, and access to large deposits that move with high volatility in international money markets.

(c) Given that the very mission of exam reports is to stress what needs correction, and given that exam information is not uniform as is publicly released information, there is risk from misunderstanding of exam information. Misunderstanding of their safety and soundness is a particular danger for banks, because they are subject not merely to the normal volatility of investors' reactions (protection against which is not a regulatory concern) but also the far greater volatility of their large deposits. Banks' unique vulnerability to such volatility at the core of their operations raises an unusual risk that some FOIA requesters might have self-serving reasons to dramatize and distort the information they secure.

In addition to those risks to a bank whose exam report is disclosed, banks other than that bank may be at risk because of the unique inter-relatedness of banks. Examples are given below in contrasting banks with FDA-regulated firms, §IV.

4. For individuals and firms, privacy interests are at stake. Exam reports often have important, sometimes dramatic, information about the finances and even reputation of not only bank personnel but also borrowers. Redaction is not an adequate answer, since in the case of many banks (especially in smaller communities) identification may be discernible from such basic facts as a loan's size, timing or other aspects. Similarly in the case of corporate borrowers, loans from even the largest banks may convey to knowledgeable competitors and security analysts information about the borrower's activity that may injure the borrower.

5. Consideration of changing [8] must take into account the problem of procedural protection (i.e., "reverse-FOIA") for the borrowers or bank personnel or whoever else might be the subject of negative comments in an exam report.

6. The importance of preserving undiminished the cooperation and candor between bank personnel and examiners has been stressed since the first court decisions on [8], and as recently as 1992.

The bank examination and supervisory process is different enough from other agencies' inspections to account for the difference in FOIA-availability of exam/inspection reports and related information. Consideration of FDA inspection reports, and their availability, is presented below, §IV.

7. In 1991 and 1992, the Senate debated whether, in the case of closed banks, there is less justification for preserving exam confidentiality. Congress' not passing an amendment seems sound, given (a) the chilling effect on the interplay between examiners and troubled banks that would be likely if exam information were FOIA-available; and (b) the possible difficulties that FOIA-availability would create for agency efforts to sell such banks' loans or the banks themselves.

8. Since FOIA's original enactment, some people have argued that [8] is superfluous, or is unjustifiable special treatment, given the availability of exemption (4). It is not superfluous: First, because [8] covers matter not covered by (4). Second, because [8] is so clear and well-understood by the officials and the affected private sector. Third, because even if all information secured from banks were potentially within (4), whether or not (4) applies would involve

record-by-record determinations. Though that type of burden does not in itself justify categorical non-disclosure as under [8], that work-load does seem weighty if it would produce very little more disclosure than is produced by the current clearer and simpler categorical treatment.

Not only exemption (4) but also (5), (6) and (7) would come into play for record-by-record determinations if [8] were dropped, see §X.B. below.

As for whether [8] is unjustifiable: As long as there is reason to continue the unique regulatory regime of bank "supervision and regulation," there is also reason to protect the regime's efficiency and effectiveness by shielding against random disclosure of whatever happens to be in an exam report or related records, whenever a member of the public happens to call for its disclosure.

9. A separate question arises over information about compliance with laws that do not go to the banks' safety and soundness, like Truth in Lending. In 1977 when Congress rejected a change regarding Truth in Lending compliance, and again in 1989 when it adopted a tailored method for disclosure regarding Community Reinvestment Act compliance, Congress showed that if more disclosure is desired on a matter, there are more appropriate modes than blunderbuss treatment of [8].

10. Finally, assuming that [8] is not repealed or amended, three potentially fruitful steps are worth considering for agency action:

(a) Recognize [8]'s special status and avoid broad applications of it. In fact, there is reason for concern about whether the bank agencies are unduly restrained about implementing FOIA's disclosure orientation, see Section V.A.

(b) Experiment with non-FOIA disclosure to make available information covered by [8]. Perhaps it would be useful to try, (although I end up skeptical), e.g., making information ordinarily non-disclosed available after a substantial interval (say, five years) and on only selected banks, e.g., ones that had consented.

(c) Continue the newly-established (since this study began) routine of quarterly meetings between FOIA administrators at FDIC, FRD, OCC and OTS.

II. At the Agencies

A. Bank Examinations: Purposes, Kinds of Information

The first point to make about bank examinations is that they are not audits. Audits are conducted by certified public accountants, with a single and largely stand-alone purpose: to gather evidence to verify and express an opinion on an entity's financial statements and the degree of compliance with established criteria such as generally accepted accounting principles, for the benefit of investors and others who may rely on financial statements. An auditor's opinion on the financial statements is usually a one-page document that is later published with the financial statements in the institution's annual report to shareholders. In addition, CPAs are required to report material weaknesses to management orally or in confidential management letters.

While audits are not intended to detect all fraud, errors, irregularities, or illegal acts, audit standards require that audits be designed to provide reasonable assurance of detecting material misstatements of financial statements due to any such events. The auditor has a search responsibility for illegal acts having a direct and material effect on the financial statements. The auditor also has an investigation and reporting responsibility for any illegal acts that come to the auditor's attention, unless clearly inconsequential. The auditor must express a qualified or adverse report if any act has not been properly accounted for or disclosed in the financial statements. And the auditor must consider withdrawing from an engagement if the client does not take the appropriate remedial action; a withdrawal would trigger the SEC Form 8-K reporting requirement. Auditors need not report such an event to regulators directly.

Although there are some similarities between audits and bank exams, exams have different objectives and focus.

In the first place, exams do not stand alone but are a major fact-finding arm of the relatively unique task of bank supervision. Exams have three main objectives: (1) to evaluate a bank's soundness and compliance with law; (2) to permit the agency[9] responsible for supervising that bank to evaluate the bank's management, including its board; and (3) to identify and follow up on areas needing corrective action by management to strengthen the bank, improve its performance, and assure its compliance with law.[10] Underlying those objectives are the fundamental purposes of protecting depositors and the public interest in bank safety and soundness—an interest arising not only from deposit insurance but also from the unique interrelatedness among banks and their central importance to borrowers, therefore to the economy.

---

[9] In most cases, "agencies" rather than "agency," although normally one agency is the primary supervisor. For example, for national banks, both the OCC and the FDIC are responsible; if the national bank is part of a bank holding company, the Fed also is responsible in part. While a state-chartered bank might be supervised only by its state agency, the great majority are FDIC-insured and of course many are within bank holding companies.

The web of interlocking responsibility is a perennial subject of reform—e.g., as recently as 1993, Congressional hearings were held on proposals to realign these agencies. But this Report's focus on examination reports is not affected by which federal agency is examining.

In addition to the three bank-supervising agencies are the OTS, which is covered in this report, and the National Credit Union Administration, the Farm Credit Administration and Resolution Trust Company, which are not covered. Given NCUA's notably lesser size, it was omitted in the belief that it would not present different issues or aspects. FCA is omitted as because of its differences. RTC was omitted because its FOIA situation is "derivative," i.e., involves OTS or FDIC documents. In 1991, RTC received 0 (zero) FOIA requests; in 1990, 51.

[10] These objectives are stated at the opening of the Comptroller's Handbook for National Bank Examiners, March 1990, §1, p. 1. Consider: the Handbook is three inches thick; more than one inch of pages are needed to cover the categories of, and details about, assets examined.

Examiners use the auditors' reports as one of their tools, but do not use audit procedures. Examiners evaluate the prudence of practices, adherence to law, adequacy of liquidity and capital, quality of assets and earnings, nature of operations, adequacy of financial reports, and internal control and audit systems.

In the second place, while audits and exams are similar in that both have established criteria for evaluation, exam criteria are more loose-fibered, dealing rather broadly with quality of management and risk assessments of business decisions and operations; and dealing with evaluation of a sample of loans (often a large number) for not only the relevant financial facts about the loans and borrowers but also such less objective matters as the borrowers' character and reputation. The examiners' mandate has nothing to do with protecting the interest of investors.

In earlier days, exams were "snapshots" periodically produced by examiners on-site at the bank, often for extensive periods. Noted just below is a 1975 examination of Chase Manhattan that involved 20 examiner-years. Today, because of banking's increasingly complex and increasingly rapidly changing nature, combined with computer technology, the on-site exam is merely a part (often a narrowly focused part as distinct from a "full-scope" exam) of overall supervisory monitoring. Moreover, today exams are tailored to specific bank situations: some banks may have examiners on-site throughout a period of difficulty, others may be examined only once in about two years, and 11 multinational national banks, because of their sheer size, complexity, and significance in the banking system, have full-time "resident" examiners.[11]

Unlike auditors, examiners are not only free to express, but expected to express what one judge described as "candid opinions, good or bad, correct or incorrect"[12] on all notable aspects of the examined bank. A compellingly concrete example of findings in an exam report that would be inconceivable coming from auditors, is the following from the 1975 examination of the Chase

---

[11] From testimony of Comptroller of the Currency Robert L. Clarke, Hearing on Adequacy of Examination Levels and Compensation, House Committee on Banking, Finance and Urban Affairs, March 22, 1989, 6-7:

> We keep examination staff on full-time duty at 11 of the country's largest national banks. Together, these 11 multinational banks account for approximately 35%—more than a third—of the assets of the national banking system. Our continuous presence provides us with greater knowledge of the day-to-day managerial decisions at these complex institutions than we would otherwise be able to have. In doing so, it increases our sensitivity to the general condition of these institutions.

Like those banks' full-time "resident" examiners, the NRC has "resident" inspectors at nuclear utilities. Differences between the two regimes are considered in §IV below.

[12] U.S. v. Provident National Bank, 41 F.R.D. 209, 210 (E.D. Pa. 1966).

Manhattan Bank—a report that, along with another on Citibank, was misappropriated or leaked and became The Washington Post's lead front-page story and so a cause célèbre for a while. (For more about that event, see below, Section VII.)

The 1975 Chase Manhattan exam report, the product of 20 examiner-years of work, rated the Chase's overall condition "poor" despite "good" earnings. It said—

> —operating conditions were "horrendous;"
>
> —one department was "operating chaotically with a decided lack of internal control, effective management, and adequate staff;"
>
> —a "deplorable condition, causing payment delays, incorrect information, and generally slow service has resulted in poor customer relations and undoubtedly a loss of business;"
>
> —few current financial statements of borrowers could be found, and those found were often "illegible, incomplete, or inconsistent for comparative analysis;"
>
> —while Chase had undergone a number of management reorganizations recently, they had not produced the desired results;
>
> —Last, when some of the problems were pointed out to the bank, "much difficulty was encountered in convincing senior management of the magnitude of these deficiencies and possible impact...on the bank's financial statement.[13]

Today's examiners, I am told, would not use language like "horrendous" or "deplorable," since the target audience is the bank's board of directors. (Let it be emphasized that the reports go to the boards; that examiners meet with the boards; and that the board minutes must record the directors' discussion of the report.) Today, taking the FHLBB's 1988 exam report on the notorious failed Lincoln Savings, we find the thrift described as

---

[13] Ronald Kessler, Citibank, Chase Manhattan on U.S. 'Problem' List, THE WASH. POST, Jan. 11, 1976, p. 1 (banner headlined); Jan. 13. pp. 1, A6.

Lest one hasten to the view that if such conditions are found, there is more public interest in disclosing the exam report than in withholding it, consider that two days later, the Post published a letter from John Kenneth Galbraith: "When you published your story Sunday, I had just finished [writing] a piece.... On the basis of streetside information picked up around New York and Boston, it said almost exactly what you had said about Chase Manhattan. Perhaps exceptionally, I had not the slightest thought that I was being original." Jan. 13, 1976, p. A18.

> an association that is managed in an aggressive, risk prone manner that has resulted in a level of problem assets that severely strains capital and places the continued viability of the association in jeopardy without immediate changes in philosophy[; thus] the future of the institution is at risk
>
> ...The Board...has failed in its responsibilities to provide for an adequate monitoring process.... In addition, the independence of the Board is questioned.... In addition to these deficiencies the Board and management have engaged in activities that are considered to possess an inordinate amount of risk....[14]

The purpose and conduct of examinations has rarely been put more concisely than by Judge D.H. Ginsburg in 1992[15]:

> However denominated, the bank examination privilege is firmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency. This relationship is both extensive and informal. It is extensive in that bank examiners concern themselves with all manner of a bank's affairs: Not only the classification of assets and the review of financial transactions, but also the adequacy of security systems and of internal reporting requirements, and even the quality of managerial personnel are of concern to the examiners.

A fuller description by Judge Weinstein[16] (though less recent, not less accurate) adds notable points:

---

[14] Exam report summary pp. 1, 1.2 Digging deeper into that 3-inch-thick report does not change or add to the flavor.

The Lincoln exam was far from typical: examiners from nine different FHLBank districts were utilized; there were four examiners-in-charge, from four separate districts, with the lead examiner-in-charge a Supervisory Agent. The 13-page cover letter conveying the report to the directors called not only for a special meeting of the board to review the report, but also for a reply from the board, signed by each of the directors, setting forth the corrective actions that would be undertaken. Letter of Dec. 20, 1988, from Darrel W. Dochow, Acting Principal Supervisory Agent.

[15] In re Subpoena Served upon Comptroller of Currency, 967 F.2d 630 (D.C. Cir.)("Fleet Financial").

[16] In re Franklin Nat. Bank Securities Lit., 478 F.Supp. 577, at 579, 583 (E.D.N.Y. 1979).

> Each examination is supervised by an examiner in charge and conducted by a team of national bank examiners and Assistant National Bank Examiners....[17] On bank premises the examiners inspect bank documents, interview bank employees, officers, and directors, and observe bank operations;...
>
> Reports of Examination collect and evaluate the findings. Each report contains two sections, the open section ("white pages") and the closed section ("yellow pages"). The open section compiles the basic data of the report: it includes, for example, a Consolidated Statement of Condition, the examiner's comments and observations, and financial data supporting the figures on the consolidated income statement.[18] The only evaluative or analytical material in the open section is found in the "Page 2 Comments," the examiner's "Comments on Matters Requiring Attention." The closed confidential section evaluates these basic findings and data; it includes "the examiner's evaluation of the condition, management, earnings, capital, internal controls, ownership, and future prospects of the bank." H.R.Rep. No. 94-1669, (Adequacy of the Office of the Comptroller of the Currency's Supervision of Franklin National Bank), 94th Cong., 2d Sess. 11 (1976).[19]
>
> ...Closed or confidential sections are contained on forms entitled "Confidential Memorandum to the Comptroller of the Currency." The initial page of these forms lists questions calling for the examiner's comments on precisely specified problem areas: whether the examiner "regard[s] the management as safe;" whether "the directors exercise reasonable and independent supervision over the bank's affairs;" whether the bank has violated statutes forbidding

---

[17] Author's fn.: National banks are examined almost entirely by OCC only; in addition, 309 national banks were examined by FDIC in 1992. State-chartered banks that are members of the Federal Reserve System are examined by both their state agencies and the FRS. State-chartered non-member banks are examined by both their state agencies and the FDIC.

OCC employs 2,871 examiners, with responsibility for 3,300 national banks (total assets, about $2,100 billion). FDIC employed about 3130 examiners, engaged almost entirely in examining about 7,000 state-chartered banks that are not FRS members, plus about 500 state-chartered savings banks. FRB employed about 1350 examiners, with responsibility for 957 state-chartered member banks (total assets, $638 billion) and 6,348 bank holding companies (total assets, $3,366 billion). OTS employs 972 examiners, engaged primarily in examining 1,733 thrifts with assets of $780 billion.

[18] Author's fn.: The report begins, when transmitted to the bank, with a letter to the board of directors, summarizing the results and stating the composite rating assigned to the bank.

[19] Author's fn.: Today, there is no confidential section, at least in OCC reports. The entire exam report goes to the bank, although agency memoranda and correspondence may not.

> "unsafe or unsound practices;" and whether the examiner "consider[s] the bank solvent." Subsequent pages, entitled "General Remarks," allow the examiner to comment on the broader topics of: (i) "Conditions of the Bank;" (ii) "Management;" (iii) "Earnings;" (iv) "Capital:" (v) "Internal Control and Audit Procedures;" (vi) "Ownership;" and (vii) "Future Prospects." The examiner is instructed to begin "each heading with a descriptive word covering the over-all condition such as Excellent, Good, Fair, or Poor."

B. Practice on Confidentiality

Consider, before examining the agencies' administration of [8], how long-standing and deep are these agencies' views about the confidentiality of exam reports. These views illuminate the reasons for [8]'s inclusion, without objection, in FOIA.

> The policy of protecting confidentiality of examination reports goes back over 125 years to the establishment of the national banking system. The policy was publicly stated by Comptroller of the Currency John P. Knox in his annual report in the year 1881. Subsequent Comptrollers of the Currency and Secretaries of the Treasury have reemphasized the policy in Congressional testimony and in other public statements.[20]

The solidity of the agency view comes through in the famous 1913 Money Trust Investigation:

> Mr. [Samuel] Untermyer [counsel for the committee]: Is the information gathered by your examiners regarded as secret?
>
> Mr. [Lawrence] Murray [Comptroller of the Currency]: It has always been regarded by the office as confidential.
>
> Mr. Untermyer: Well now, confidential as against whom?
>
> Mr. Murray: We have never even produced the reports of the examiners in court. We were subpoenaed to produce them at one time, and we asked the judge to rule whether or not we

---

[20] OCC, Historical Overview, *supra* n. 1.

> should obey under the law as it existed, and he ruled that those reports need not be produced in court under the subpoena."[21]

In 1976, FDIC Chairman Robert E. Barnett stated the need for this confidentiality in a speech to the CPA Society and the Robert Morris Associates:

> [W]e consider the examination report part of a confidential process. Bankers are willing to discuss frankly the weaknesses in their loans because they are confident that anything told to an examiner will be treated in confidence. Bank examination represents an independent assessment of a bank's condition by a trained professional. The necessary information gathering and loan discussion are facilitated because the banker views it as a cooperative affair rather than an adversary process. Time and money can be saved if this cooperation continues, and our career examiner employees are convinced that the data gathered through this process and the criticism extended by our examiners are both honest and thorough. If the confidentiality is lost or the process becomes adversary, there quite possibly would be a deterioration in the quality of examinations.[22]

That same year, in a rather confrontational Hearing (for reasons explained below, see §VII) before a House Government Operations Committee subcommittee, First Deputy Comptroller of the Currency Robert Bloom expanded on why

> [i]f the rules are changed to require public disclosure of what is in the examination report, there is no doubt that we will be hampered considerably in obtaining a complete picture of national banks.
>
> *My point is that if you had a report which was a public report it would be a different report....* The report that you get by an examiner's talking to a banker in confidence and the report you will get by an examiner's talking to a banker on the record is going to be a different report. In my opinion, the total efficiency of regulation will be lowered, not increased.
>
> At the present time, the bank examiner, unlike any other Federal agency official that I know of, will walk into a bank and

---

[21] Subcommittee of the House Banking and Currency Committee, Money Trust Investigation, Part 1, 1391 (1913).

[22] *Ibid.*

> the banker will let him roam around that bank and let him look at anything he wants without the bank's counsel at his elbow. If an IRS agent walks in or if an [FTC] agent walks in or if an SEC agent walks in, the first thing the businessman is going to do is call his lawyer. And the whole thing is a very arm's-length operation.
>
> Bank examination by tradition, but for good and sufficient reasons I believe, has evolved in a completely different direction. ...I would say that before you discard [that tradition], you had better take a look at some of its advantages. It has the advantage of providing the Government with a picture three times every two years of what is going on inside a bank. You will never get this by any public disclosure system.
>
> I am not saying that banks should not disclose. They should. And they do—almost all of the financial numbers in the bank. But when you are talking about this personal interrelationship between bank examiners and bankers, you are talking about something else. *You are talking about a subjective process basically. And it will change if it is public.*
>
> The bank examiner isn't going to say the same thing for public distribution that he says for the Comptroller's eyes only. I am not saying that it couldn't work that way, but it will not be the same system....[23]

Mr. Bloom later explained why, in his view, exam information would not be a useful addition to the already public information about banks' finances:

> [T]he information we have is so detailed that it couldn't possibly be of use or even feasible to publish.
>
> Our [exam] report is pages and pages of analysis of bank borrowers—the companies that borrow from banks. This is what the statute says should not be disclosed under penalty of fine or of imprisonment.[24] That is information not about the bank, but about the bank's assets which are loans. In other words, it is the financial condition and everything else about the borrowers of the bank. That is the bulk of our report....[25]

---

[23] Subcommittee on Commerce, Consumer and Monetary Affairs, Oversight Hearings into the Effectiveness of Federal Bank Regulation, Jan. 20, 1976, 1, 3, 26-7 (emphases added).

[24] The statute to which he referred, and similar statutes, are noted below, §III.A.

[25] *Id.* at 29.

What is to be made of these statements by agency officials? I do not dismiss them as special, self-protective pleading, but even if one does, they establish two important points. First, even if one discounts the officials' statements as overdrawn (I do not believe they are), still, insofar as they are not overdrawn but valid, *pro tanto* there will be losses in the exam process. Second, even if the officials' views are wholly wrong, they do indicate how examiners and their supervisors will most likely react to FOIA-availability of exam reports. That is, even if there ought to be no difference on exam reports as a result of changing [8], indeed "it would be a different report." That would be a loss. This is not to say that the loss is preclusive. But one should risk such loss only if persuaded that lowering the effectiveness and efficiency of examinations and reports matter less than do the interests underlying FOIA generally.

C. The Agencies' Experience with [8]

> Virtually all of the [agencies] have promulgated regulations that essentially parrot the provisions of the FOIA itself.... The[se include] regulations, which outline situations where the agency may discretionarily disclose exempt examination reports [such as] disclosure to the bank's agent; disclosure to a parallel state agency; disclosure to other federal banking agencies; disclosure where criminal irregularities are being investigated; disclosure of reports to the data center; and disclosure pursuant to a valid court order.[26]

Only two notes need be added. First, disclosure pursuant to court orders has been contested in a number of litigations involving, for example, stockholders' class action suits against bank managements. These cases, which are very distinguishable from FOIA cases but relevant in evaluating whether [8] should change, are considered below, see Section VI.B.

Second, as part of their effort to keep exam reports confidential, every agency places on the front of the report a legend like the one recently quoted in a decision denying discovery (in a private securities fraud suit):

> The Report and other information forwarded to the savings and loan association "remains the property of the [FHLBB] and, except as otherwise provided...no person, agency or authority to whom the information is available, or any

---

[26] BRAVERMAN AND CHETWYND, INFORMATION LAW (1985), v. 1, 483-4. All these regulations are in 12 CFR: FDIC's, §309; FRS's, §261; OCC's, §4; OTS's, §506.

> officer, director or employee thereof, shall disclose any such information.[27]
>
> The OCC regulations concerning disclosure of bank examination reports [subject] those who violate its provision to a statutory [criminal] penalty.[28]

Almost every private practitioner and bank consultant interviewed for this Report told of efforts to get copies of exam reports in connection with work as the bank's own counsel or consultant. In every case in which inquiries were made to regional offices or lower-level officials, the answer was that no one outside the bank could even see the exam report. In every such case, inquiries to higher-level officials made clear that persons acting as agents of the bank could, if the bank believed it necessary for work on behalf of the bank, have copies of the reports.

As for FOIA requests, figures on total volume, and on requests involving [8] and appeals, are detailed in Appendix 3.

The Federal Reserve Board readily provided (pursuant to my request) computer "logs" reporting on all FOIA requests involving [8], including any internal appeals, from 1989 to July 22, 1993. No other agency could provide similar information. To the FRB's 50 1993 requestors, I sent a letter with four questions (see Appendix 4) and received 11 responses (out of 47 requests, since three letters were "Return to Sender...."). While the rate of response seems good, albeit lower than I had hoped for, a summary of the responses seems sufficient.

First, two responders sent voluminous correspondence. One of those two seems worth recounting. J.C. Lewis, formerly a member of the House Banking Committee staff, in April 1993 made a FOIA request to OCC for "the data and analysis...relating to the Interagency Policy Statement on Credit Availability...published on March 10, 1993." OCC furnished some documents and replied that since another one had been created by FRB, the request had been forwarded to FRB. The FRB, relying on [8], denied the request. Mr. Lewis immediately appealed that denial, with a full explanation, and three months later the FRB Vice Chairman upheld the denial, relying not only on [8] but also on exemption (5).

It is inappropriate for me to second-guess that denial, and even if it were not inappropriate I lack sufficient information, and even if I had all the information it would go beyond the proper mission of this Report to get into the handling of any one specific request. Further, in the course of the author's work on this Report, no agency seemed remotely as responsive and impressively well-organized in its FOIA implementation, as FRB.

---

[27] In re Atlantic Financial Federal Securities Litigation, 1992 WL 50074 (E.D. Pa.), at 2.

[28] Feinberg v. Hibernia Corporation, 1992 WL 54738, at *6 (E.D. la.).

The criminal provision is 18 USC § 641. The regulations invoking it, in the case of OCC, are 12 CFR §§ 4.18(c) and 18.9; *see similarly* FDIC's 12 CFR § 309.6.

Nonetheless, the author believes it worth noting Mr. Lewis' experience, for two reasons. First, reliance on [8], followed up by reliance on (5), may seem to some outsiders as an undue readiness to rely on [8]. (If any reader infers that this is a negative comment on FRB's treatment of the request, the author can only repeat the prior paragraph.) Second, Mr. Lewis sent the author a letter about FOIA which seems too impressive to leave in files—see Appendix 5 for excerpts.

As for other survey respondents, at least two requesters were not satisfied with the clarity of reasons for their denial. One requester who appealed twice, and so secured some additional information, believed the denial on [8] erred, but would not urge modifying [8]; instead, "change the FOIA response regulations to encourage persons handling FOIA requests to be fully responsive unless there is a clear case that release...will damage the Government." Another requester, a multinational bank employee who had been on the FRB staff, made repeat requests for monthly "currents," an internal document about recent General Counsel actions. This person believes those documents are valuable, understands why they are often withheld but regrets that they are not more available. A third requester, from a major law firm:

> Cannot say how highly I think of [the] FRB FOIA office. Absolutely top notch, the best I ever dealt with, pleasant, timely, give reasons that are succinct and communicate, even give advice to try again because document may become available, and in such situations even keep the request in action file. Richmond FRBank far less helpful.

What conclusion does the survey suggest? If one assumes that the most likely responders are people who are angry or want change, the survey makes little if any case for change. But whatever one's assumptions, there are too few responses here to establish any notable conclusion.

D. State Agencies' Experience

Thanks to the unstinting aid and support of the Conference of State Bank Supervisors staff, responses were secured from 12 states' agencies about their experience and views: California, Florida, Illinois, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Texas, Virginia, Washington and Wisconsin. These States were selected to assure the inclusion of ones that I believe are noted for their strong orientation in favor of disclosure, as well as other major States. For that questionnaire, see Appendix 6.

Before reciting the survey results, note—for sheer interest—an episode recounted by Sidney Bailey, Virginia's Commissioner of Financial Institutions. In the late 1980's, a financial institution in Virginia sued an author and a magazine for publishing an article that named that institution among others in "weakened" condition, based on information from a commercial rating service. Defense counsel subpoenaed recent exam reports, whereupon the agency recovered from the institution all copies of the subpoenaed reports. Commissioner Bailey was summoned to show cause why he was not in contempt, but the judge brushed aside Bailey's effort to explain that nondisclosure was needed less to protect the institution than the privacy interests of borrowers. Seeing no alternative, Bailey went to the bench to show the judge one of the reports in question, which—

> against all odds, contained a classification of a loan to the judge, with a considerable amount of detail about the reasons for the classification of the loan as substandard. "The court's recognition of the justification for confidential treatment of [exam] reports came fairly soon...."

With regard to the survey's first response, eleven of the 12 respondent states never give out exam reports or similar information to private persons (other than at the examined institution). Their non-disclosure does not include possible protected responses to court subpoenas or other legal discovery requirements; but none of the 12 had had any experience with such responses that they deemed pertinent. (Illinois noted that it always "require[s]...a protective order....")

Florida, pursuant to a 1992 statute, does release upon request redacted exam reports on failed banks after one year, if there is no on-going investigation. This enactment was a result of the decennial review of the banking code. Until a very recent major request, fewer than six requests had been received. That recent request sought all exam reports on banks that failed since 1982. Only one bank has failed since this law was passed, so there is almost no experience with how the potential public disclosure of reports at failed banks may affect examinations at problem banks.

Also on failed banks, but very different from releasing exam reports or similar information and instead similar to the federal agencies' FDICIA requirement for Inspector General reports, Oregon has a statute that authorizes the agency, in the case of failed banks, to release to the public information deemed to be in the public interest.[29] That statute was a response to a "financial massacre" in 1979-83, when about one-third (or 30) of the state-chartered banks failed and another 15 were the subject of agency-supervised mergers (but since the end of 1987, no failure has occurred). A handful of such releases were issued.

---

[29] Ore. Stat. 706.720 (4).

Washington State and Florida have divulged composite CAMEL ratings in the aggregate (for all banks in the state) to the legislature, to provide them with a measure for determining the state of the industry. No specific bank names or ratings were divulged. Similarly, Wisconsin "in years past" disclosed

> the number of banks on the agency's 'watch list' [just as federal agencies have done], or those with a CAMEL rating of less than three.... As the watch list shrank, the practice of reporting such numbers ended since it was believed the media/public might be able to determine the handful of banks under close watch by reviewing performance data contained in call reports.
>
> However, with the advent and proliferation of bank rating services such as IDC, Sheshunoff, Bauer and VeriBanc, the public and media now have greater capacity than ever before to assess a bank's health.

Next, the state agencies' second response, on whether those agencies had experienced any pressure to release the kinds of information covered by [8], New York and Pennsylvania have had pressure from community groups and state legislators for material concerning CRA compliance. And in Oregon around 10 years ago, the leading newspaper made some attempts to secure disclosure.

The third response: In only two of the 12 states has there been a leak or inadvertent release of information. First, in a New England state, in 1988 a director of a state-chartered credit union leaked portions of an exam to the media, which reported the credit union's low rating; "a minor depositor run ensued." Second, in Virginia, a radio news announcement about the closing of a small bank was made the day prior to the scheduled closing, which caused a "fairly serious run on desposits [the] next morning, making hasty emergency measures necessary."

Coming last to the state supervisors' views. Perhaps the most important point, stressed by California, New York, and Pennsylvania (here quoting California):

> [A]ny change in [8] would have a definite impact on how the Department interacts with federal banking agencies in regulating the Department's licensees. Presently, the Department closely coordinates its examination and regulatory actions with the [FDIC] and [FRB]. Such concurrent examinations result in a sharing of work product derived during the examination, as well as the resulting reports of examination. All such information, documentation and report sharing is

dependent upon the knowledge that the shared information will be held in confidence by the receiving regulator.

Depending upon the extent of the amendment to [8], the Department would no longer have the assurance that such shared information will be confidential. If [8] were repealed in its entirety, it is possible all such information, including the Department's reports of examination, would have to be produced under a FOIA request. The Department would have to carefully reconsider its sharing of information with the federal agencies for the following reasons.

First, as discussed above, the records held by the Department are generally considered confidential, and the Department has a vested interest in preserving that claim of confidentiality. That interest would be jeopardized if the Department shared confidential information with the federal regulators knowing the shared information would be subject to public scrutiny.

Second, there are potential legal ramifications. It is possible that the courts could rule that such a transfer of information by the Department my be viewed as a knowing waiver of our claim of confidentiality with regard to that information under [a California statute], as well as violating the prohibitions against releasing personal information contained in [another statute]. Such court rulings would be based on the Department violating the intent of those laws when it transfers information knowing it will be released to the public by the federal banking agencies. Individuals found to violate the [second statute] may be subject to fines and imprisonment.

For those reasons, a modification or repeal of [8] would cause the Department to severely restrict the types and amounts of information it would transmit to those federal agencies.

From the federal agencies' perspective, if the Department is reluctant to share information with the agencies, there would appear to be little benefit for those agencies to share documentation and information with the Department. The result would most likely be a straining of relations between state and federal agencies, leading to uneven and spotty regulation of banks. In that same vein, costs to all agencies could rise in the state and federal agencies would no longer use each other's examinations, resources, and reports to satisfy their examination and regulatory needs.

> In sum, any amendment or repeal of Exemption 8 would result in a change in the way in which the Department shares information with federal banking agencies. Such a change in operations would most likely result in less efficient regulation of California state licensed banks.

Many states stressed (quoting Texas)—

> the chilling effect on the free expression of opinions and criticisms by bank examiners. One may speculate about bank runs and the like, but the effect on the examiners would be immediate, predictable, and detrimental to good regulation.

And a third point (quoting Florida): "exam reports would have to undergo additional review by legal staff. And in some degree toned down to take into account department liability regarding disclosure." Texas also made that latter point and closed their letter with this: "Our resources are stretched enough as it is without having to fend off litigants who were mentioned in examination reports."

Three more views—

> Illinois wrote: "If [8] was repealed or substantially modified, our Agency would be compelled to modify our [exam reports] in order to prevent disclosure of critical confidential information. The impact upon the regulatory process would be that the institutions that we supervise might not receive the feedback they need from the examination process."
>
> Another state concluded, after noting the deep problems of the 1980s: "The recovery or the necessary closing were accomplished, and in the worst case, in an orderly manner, because of the absence of 'runs on the bank.' The requirement of divulging the reports of examination will disenfranchise the one element necessary to the success of our workout strategy—time."

Last, Wisconsin concluded: "We see no value in repealing [8]. This is clearly one case where the release of now-protected information to the public would benefit few and potentially hurt many."

III. Bank Examinations in the Congress

A. Independent of FOIA

The agency officials' emphasis on the confidentiality of exam information is supported and reflected in a statute that dates back at least 80 years that holds that criminal sanctions expressly prohibit any bank examiner from disclosing (without official permission) the names of borrowers or the collateral for loans, 18 USC §1906.

A second statute plainly indicates agency authority over whether to disclose. Since 1875, the Comptroller has had authority to publish the exam report on any national bank that does not comply, within 120 days after notification, with the Comptroller's recommendations or suggestions based on an exam. 12 USC §481. But my best efforts unearthed no knowledge of this provision ever having been used.

Four post-FOIA statutes are relevant. Two of them reflect and support the agencies' emphasis on protecting confidential information relating to bank customers. First, the Right to Financial Privacy Act of 1978 (12 USC §3401) outlines numerous restrictions on the disclosure of financial records held by bank employees and federal regulatory authorities. It also imposes affirmative duties on government and bank officials to safeguard individuals' financial records, and also allows bank customers to recover civil penalties from "[a]ny agency or department of the United States or financial institution obtaining or disclosing financial records" in violation of the Act.

Similar limitations appear in a 1982 statute aimed at assuring oversight, via GAO audits, of bank examinations (31 USC §714). This requires, among other limitations on the GAO, that GAO workpapers "shall remain in the [audited] agency," "except for the temporary removal of workpapers…that do not identify a customer of an open or closed bank….," §714(d)(2).

Since 1989, the agencies are required to publish monthly their formal actions dealing with troubled or failed banks. First, in 1989, FIRREA (Financial Institutions Reform Recovery and Enforcement Act) amended the Federal Deposit Insurance Act (12 USC §1818(u)) to require disclosure of all final enforcement orders. In 1990, that requirement was broadened to include "any written agreement or other written statement for which a violation may be enforced," unless the agency "in its discretion" determines that publication would be contrary to the public interest.[30]

---

[30] And since 1988, OCC has required "annual disclosure statements" of financial condition and operations, by all national banks not covered by securities disclosure requirements. 12 CFR Part 18.

And 1991's Federal Deposit Insurance Corporation Improvement Act (FDICIA) provides that if an insured bank fails, the Inspector General of the primary agency must, within six months: formally review the causes of failure and the supervision; provide the review report to the GAO and Congress; and make it available under FOIA.[31]

B. [8]'s Legislative History

Exemption [8] originated in a July 15, 1964 letter from Federal Reserve Board Chairman William McC. Martin to Senator Edward Long, Chairman of the Judiciary Subcommittee. This letter, noting earlier letters and meetings between Board and Subcommittee staff, stated that the addition of several exemptions to the FOIA bill did not "relieve the Board's concern regarding the possibility" that disclosure would be required for exam reports and

> portions of reports of condition submitted to the Board by [the] member banks, and various operating reports, either required to be submitted or voluntarily submitted by the [Federal Reserve] Banks.... While the Board is aware that a liberal interpretation of exemptions "(4) trade secrets; [and (5) or (7)]" might exempt documents of the nature aforementioned, it is the Board's judgment that sufficient uncertainty in the regard exists as to require the Board's opposition to the subsection as presently worded.[32]

Chairman Martin's letter recounted that when the Board's view had been voiced by Board staff, Subcommittee staff had requested that the Board suggest language that would "offer to the Board the assurance of exemption from publication consistent with the Board's functions and the public's right to reasonable access to the Board's records." Martin's letter closed setting out a suggested new exemption [8], "to serve the legitimate interests of the public and of the several agencies responsible for the regulation and supervision of financial institutions." The sole difference between the language of [8] suggested in that letter and of today's [8] is that the letter referred to "any" agency, while the statute now says "an" agency.

---

[31] 12 USC §1831o.

[32] Martin letter, 1-2. Although this letter apparently is not in the legislative history, it is referred to in Chairman Martin's later letter of March 10, 1965 to House Government Operations Committee Chairman William Dawson, Hearings on Federal Public Records Law, 89th Cong., 1st Sess. parts 1 and 2 (1965) (hereinafter "1965 House Hearings"), at 247.

Exemption (4) expanded to almost its final language on July 22, see text at note 80 below. The final, enacted version of (4) first appeared (so far as we can tell) in October 1965, n. 92 below.

The only other references to [8] in the legislative history, as set forth below, are two witnesses' comments when they were first handed the language at a 1964 hearing, brief references in letters from banking agencies, and brief references in the final Committee Reports.

FOIA emerged from Congressman John Moss' efforts over several years to increase the availability of government records, combined with Senate efforts to amend the Administrative Procedure Act of 1946.[33] The original bill that became FOIA contained only what were eventually enacted as exemptions (1), (3) and (5); those three did not touch bank information.[34] Although only one official close to bank regulation testified at Senate Hearings in October 1963, the Hearings included letters from the bank regulators, expressing concerns about the lack of an exemption for such material.[35]

The Chairman of the Federal Reserve Board wrote (July 11, 1963) that the existing APA Section 3 granted agencies the right to determine whether there was good cause to withhold information, and claimed that this authority was "vital to the Board's effective performance of statutory functions relating to supervision and regulation of commercial banks."[36]

Similarly, the Chairman of the Federal Home Loan Bank Board wrote (July 12, 1963) expressing concern that disclosure of financial institution information "might precipitate runs and pressures on such institutions which could threaten the entire economic structure of the country."[37] The Board suggested that the Committee consider

> the inclusion of a provision making an exception for matters relating to the condition or affairs of financial institutions, where the agency having authority with respect to the

---

[33] H. Rep. No. 95-793, A Citizen's Guide on How to Use [FOIA] and the Privacy Act in Requesting Government Documents, 5 (Nov. 2, 1977); Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, U.S. Senate, 93rd Cong., 2d Sess., Introductory Discussion of the Legislative History of [FOIA], 8 (1974) (hereinafter *FOIA Source Book*).

[34] However, exemption (3), which until 1974 authorized withholding of any matter "specifically exempted from disclosure by statute," arguably may have related to bank information, as noted by one witness, see the 1963 testimony of Treasury General Counsel Belin, below, text at n. 39. And see the Treasury statement Belin submitted to a Senate Hearing in 1964, below, text at n. 68.

Further, in the 1963 Senate Hearings (p. 91), Committee Counsel Fensterwald said: "When this bill (S. 1666) was drafted, it was the view of some of the sponsors that most of the agencies that require an exemption had it by specific statute. As it turns out, we find many of them do not."

In short, there was so little reference to any "exemption (3) statute" that we may assume it was of no consequence.

[35] Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963) (hereinafter *1963 Hearings*).

[36] *1963 Hearings* at 293.

[37] *Id.* at 292.

> examination, regulation, or supervision of such institutions determines that disclosure of such matters would not be in the public interest."[38]

While testifying before the committee on October 31, 1963, Treasury General Counsel G. Andelot Belin discussed his concerns about public access to bank examination reports.[39] He explained that national bank examiners go into a bank and

> stay for quite a long time and they investigate all the loan credit files to see whether a loan is good, whether the bank has been provident and wise in extending the thing in the first place, and in keeping up-to-date credit information, and a bank can ask just about anything they want from a person to evaluate a loan. Then if it gets underwater they can ask even more. The criticism part of that report, for example, contains specific detailed criticisms of the X-Y-Z loan and the A-B-C loan for all these reasons. Now that is a very specific detailed document which I don't think any of you or any of us would want to be made public.[40]

Belin also stated that he did not believe that the information in bank examination reports was protected from disclosure by another statute, with two exceptions: (1) he noted 18 USC §1905, "which as you know is our general governmental criminal statute about disclosure of confidential information generally....;" and (2) he noted also section 1906, which "actually also deals specifically with disclosure of information by a bank examiner." But,

> One of our troubles is, we don't know the effect of [the bill and exemption (3)] on 18 USC 1905, because that has that important exception in it that you are not supposed to do this except as provided by law. It is at least arguable that specifically what [the bill] does is to provide by law that we have to disclose these things.[41]

However, in 1964 Belin pointed to another statute, as noted below, in the text accompanying footnote 65.

The FDIC's Director (the Chairmanship was then vacant) expressed his personal views that the proposed amendments' impact "would be in direct conflict with the established practices that are deemed a requirement to the proper administration and supervision of insured banks and contrary to the public interest."[42]

---

[38] *Id.*

[39] *Id.* at 172.

[40] *Id.* at 190.

[41] *Id.* at 190-91.

Shortly after the 1963 Hearings, Treasury General Counsel Belin responded to the Committee's request that the Committee members "be supplied with information which would disclose the types of files which the Treasury and its various bureaus keep which contain information about private citizens, the disclosure of which might be harmful to those citizens."[43] In his response, Belin listed the types of information that should be protected, including the "explicit exceptions protecting from public inspection records of the following types:...(g) Bank information."[44]

Additional Senate Hearings were held on July 21, 22 and 23, 1964.[45] For these Hearings, an April 20 subcommittee revision of the bill, dated April 20, 1964, was used.[46] That version contained seven exemptions including an exemption [4] which said in its entirety: "trade secrets."[47]

At this point, the sequence of events and of versions of the bill becomes a little puzzling. Apparently on the second day of the subcommittee Hearings, July 22, a full Senate Judiciary Committee Report reported favorably on S. 1666, including a fuller exemption [4]: "trade secrets and other information obtained from the public and customarily privileged or confidential."[48] In that same July 22 Report, exemption [8] appeared—just as finally enacted—for the first time so far as we can discover.[49] (But no exemption [9] was in yet.)[50]

The letters and prepared statements in these July Hearings were written without knowledge of [8]. However, on the second day of the Hearings, OCC's Chief Counsel Robert Bloom and one other witness addressed themselves to [8].

Bloom's "off-the-cuff reaction" to the new provision he had just read was that "exception [sic] 8, while it goes a long way toward exempting documents in our Office, does not cover some large categories of records such as those in connection with applications for new banks, branches or mergers."[51] He was concerned about this because "the applicants are usually prominent men in the community and we would never get an application, I do not [sic] think, if they felt that every part of our files which contain intimate personal information" might be disclosed.[52] Bloom said that bank reports should be kept confidential because

---

[42] *Id.* at 239 (letter of November 7, 1963).

[43] *Id.* at 224 (letter of November 13, 1963).

[44] Belin specified also: "...(e) Individual financial and securities records, such as Treasury checks and registered bonds, including savings bonds. (f) Business records of individuals and firms, not only as to trade secrets and such matters but other business and financial data. (g)... (h) Information submitted on the basis of its being held confidential." *Id.* at 226.

[45] Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964) (hereinafter *1964 Hearings*).

[46] *Id.* at 1.

[47] *Id.* at 3.

[48] S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964). Reprinted in *FOIA Source Book* at 86, 87. The final, enacted version of exemption [4] first surfaced on October 4, 1965 in S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

[49] S. Rep. No. 1219 at 3, reprinted in *FOIA Source Book* at 88.

[50] *Id.*

> [t]he release of such information to an unsophisticated public could, through misunderstanding, undermine confidence and cause unwarranted runs on banks.... The mere possibility that the types of information just discussed would be made available to its competitors and the general public would make bankers most reluctant to cooperate with our examiners and seriously hamper the Comptroller in the exercise of his assigned duties."[53]

Bloom presented Comments by OCC reiterating the concern that disclosure "would completely destroy the relationship between the banks and their Federal supervisors."[54]

One other witness referred to [8]—counsel for the National Rural Electric Cooperative Association (NRECA), Charles Robinson.[55] (NRECA is a national organization of rural electric cooperatives, which have a "special borrower-lender relationship" with REA, the Federal Rural Electrification Administration.[56]) NRECA's prepared statement discussed the confidentiality of loan applications submitted to REA and the concern that if such information was made available to competitor cooperatives it could be "used to harm or destroy the applicant cooperative."[57] Robinson testified that if such information were released "the ability of the borrowers to stay in business will be seriously jeopardized."[58] Noting the addition of [8], he said:

> I do not know what particular problem that language is aimed at. I assume it might be aimed at the Federal Reserve System or the Federal Deposit Insurance Corporation or something of that sort. But I think it goes to a special relationship, a financial relationship between a Government

---

[51] *1964 Hearings* at 178-79.
[52] *Id.* at 184.
[53] *Id.* at 186.
[54] *Id.* at 191.
[55] *Id.* at 274.
[56] *Id.* at 275.
[57] *Id.* at 276.
[58] *Id.* at 279.

> agency and a group of citizens or a corporation with which that agency may be dealing. I seriously suggest, Mr. Chairman, that with respect to a loan program where the very existence of the borrower in those programs is dependent on a confidential relationship between it and the Government, similar language be inserted in the bill to cover that situation.[59]

As mentioned earlier, these July Hearings include several letters written before the Hearings. The FHLBB Chairman, writing six months earlier, reiterated the concerns he had conveyed a year earlier: "[t]he delicate nature of financial institutions and the necessity for public confidence in them has resulted in a recognition of the frequent need for confidential investigations and information."[60] He included an FHLBB statement that "[t]he possible damage to institutions resulting from such a course is a matter for grave concern; not only might public confidence be undermined but information about institutions' operations that is customarily regarded as confidential would become available to competitors."[61]

Similarly, a July 1, 1964 letter from FRB Chairman Martin repeated his concern that the bill would "result in detriment to the public interest and impairment of the Board's effectiveness as a regulatory and supervisory body and as an instrument of national economic policy."[62]

The FHLBB Chairman wrote again on July 20, 1964, after reviewing the April 20, 1964 version of the bill with seven exemptions:

> [I]t would appear that reports of examination of financial institutions under the jurisdiction of the Board and various other reports and information submitted to the Board are not exempt. It is the opinion of the Board that such unlimited public access to information of this nature requires opposition to the subsection as presently worded.[63]

And Treasury General Counsel Belin testified again, on July 22,[64] when for the first time he saw the April 20 committee print; but, unaccountably, he did not see (or at least did not refer to) the new exemption [8] that Bloom and Robinson commented on that same day.[65] The Treasury submitted a detailed statement dated "July, 1964,"[66] discussing the seven exemptions. That statement declared exemption (4), covering simply "trade secrets,"

---

[59] *Id.* at 278.
[60] 1964 Hearings at 419 (letter of December 6, 1963).
[61] *Id.*
[62] *Id.* at 515, 516 (letter of July 1, 1964).
[63] *Id.* at 514.
[64] *Id.* at 168.
[65] *Id.* at 176.

> too limited to reach the confidential business information which the Department understands that the subcommittee staff agrees should be protected.... The Department strongly recommends that exemption (4) should be revised to exempt "records, or parts thereof, which contain information obtained from the public which is customarily privileged or otherwise confidential."[67]
>
> Treasury found the proposed seven exemptions gravely inadequate to protect from indiscriminate disclosure various types of documents and records in the Treasury Department which have long been recognized as legitimately and necessarily entitled to confidentiality.[68]

The Department referred to the Federal Reports Act of 1942[69] in which "Congress expressly recognized this need for confidentiality in its exemption of various Treasury records."[70] According to Treasury (without citation or quotation), the legislative history of that Act showed that certain information should not be disclosed "except in accordance with the Treasury Department's own regulations on disclosure."[71] Treasury believed that the following reasons in support of that 1942 exemption still held true: "the private character of much of this information and the injury to essential Government operations which would result from indiscriminate disclosure."[72] Specifically dealing with OCC's national bank records, Treasury noted that they "have always been deemed confidential with respect to disclosure to members of the public.... The protection of these records from indiscriminate disclosure is essential to the proper supervision of the national banks."[73] In conclusion, Treasury stated that

> unless this subsection is amended to contain a generalized exemption for records which must be kept confidential in the public interest, or the individual exemptions are greatly extended..., the Department considers it essential that there be

---

[66] *Id.* at 177A.

[67] *Id.* at 177C.

[68] *Id.* at 177D.

[69] 5 USC 139-139(f). This provision is no longer law, but we have been unable to find just when it was repealed or amended.

[70] *1964 Hearings* at 177D.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 177E.

> an exception for the types of records similar to those exempted in the Federal Reports Act; namely, records relating to fiscal, monetary, foreign economic, national banking and internal revenue operations of the Treasury Department.[74]

The American Bankers Association also sent a statement to the Committee,[75] discussing the contents of a bank examination report:

> The comments in the report concerning management, practices, and policies are views, opinions, and conclusions of the examiner. The examination report usually contains a special section covering personal affairs of bank employees.[76]

The ABA expressed its concerns about possible disclosure of such reports:

> Because of the understanding that the contents of such examination reports and such other records will be held confidential, the officials of the bank feel free to disclose to the examiner facts having a bearing upon the bank's loans, general conditions, problems, operating and investment practices, and loan and credit policies, and the examiner feels free to offer suggestions, comments and criticisms on the affairs of the bank, its personnel, and problems. This freedom of expression on the part of both the bankers and the examiner would be destroyed if the records should be circulated out of the customary bank supervisory channels.[77] If details concerning a customer's loans and financial affairs are made public, it may result in the customer losing business and could conceivably have a drastic impact on his business prospects.[78]

No change was made in the language of [8] as it had been suggested by the FRB on July 22, 1964, and the Senate passed S. 1666 on July 28.[79] The House took no action prior to adjournment. In the next Congress, an amended version of S. 1666 was introduced on February 17, 1965 as S. 1160[80] and H.R. 5012.[81] These bills contained eight exemptions, including an expanded [4], exempting

---

[74] *Id.*

[75] *Id.* at 549 (letter of July 27, 1964).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] 110 Cong. Rec. 17086 (1964). The Senate reconsidered S.1666 three days later, but passed it again unchanged. 110 Cong. Rec. 17666 (1964).

[80] S. 1160, 89th Cong., 1st Sess. (1965) introduced by Senator Long et al.

[81] H.R. 5012, 89th Cong., 1st Sess. (1965) was introduced by Representative Moss.

"trade secrets and commercial or financial information obtained from the public and privileged or confidential."[82]

The House held hearings on H.R. 5012 in March and April 1965.[83] The Hearings included a letter from FRB Chairman Martin dated March 10, 1965, responding to questions posed by the House subcommittee.[84] He noted that the language of exemption [8] is

> identical with language that the Board proposed to be added to S. 1663. This proposal, with explanatory comments, was submitted to Chairman Long of the Senate Subcommittee on Administrative Practice and Procedure, by letter of July 15, 1964.[85]

However, Martin went on to state that the original APA "adequately and reasonably secured" the "public's right of access to Government records and information."[86]

The FDIC Chairman also responded to the subcommittee's questions and reflected "upon the concept of confidentiality which has traditionally attended the exercise of supervisory powers over banks in general."[87]

The Treasury's letter to the House subcommittee said of [8] that it "considers this exemption necessary."[88] And [8] drew the following in a letter from the FHLBB:

> all matters relating to the condition or affairs of financial institutions should be exempt from disclosure where the agency having authority with respect to the examination, regulation or supervision of such institutions determines that disclosure would not be in the public interest. The present bill, by limiting the exemption to such matters as are "contained in or related to examination, operating, or condition reports" as set forth in the bill, falls short of what the Board believes is needed in this connection for the protection of the public.[89]

---

[82] S. 1160 at 5, H.R. 5012 at 3.

[83] *1965 House Hearings.*

[84] *Id.* at 247 (letter of March 10, 1965).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 435 (letter of March 17, 1965).

[88] *Id.*

[89] *Id.* at 243-44 (letter of March 30, 1965).

The Senate held hearings on S. 1160 on May 12, 13, 14 and 21, 1965.[90] Again NRECA counsel Robinson testified. While pleased with the expansion of [4] to include "commercial or financial information," he was concerned about the requirement that the information be "privileged or confidential."

> The trouble with the language in exemption No. 4 as it now stands is that it must be privileged and confidential, but nobody knows what that means. So let the REA administrator and the borrowers decide what is privileged and confidential....[91]

He also submitted a NRECA statement suggesting that (4) be revised to read: "trade secrets and commercial, technical and financial information submitted and received as privileged or confidential."[92]

FHLBB Acting Chairman Michael Greenebaum wrote the Senate Committee noting "with favor" the addition of [8] and the expansion of [4]. However, he set forth other objections to the bill and concluded that "the Board opposes the adoption of [the bill] for the reasons set forth herein as well as the basic shortcomings stated in [earlier] letters...."[93]

On October 4, 1965, the Senate Committee reported its final amendments to S. 1160, with nine exemptions.[94] In (4), the words "the public" were changed to "any person," giving (4) its final form: "trade secrets and commercial or financial information obtained from any person and privileged or confidential." And [8] remained unchanged. The Senate passed this bill on October 13, 1965,[95] the House on June 20, 1966.[96]

The Senate and House Reports' total comments on [8] are as follows. The Senate stated that [8] is:

> directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.[97]

---

[90] Hearings on Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965).

[91] *Id.* at 337, 346-47.

[92] *Id.* at 356.

[93] *Id.* at 462-63 (letter of April 26, 1965).

[94] S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

[95] 111 Cong. Rec. 26821 (1965).

[96] 112 Cong. Rec. 13661 (1966).

[97] S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965), reprinted in FOIA Source Book at 45.

And the House Report said:

> This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm.[98]

It may be of interest to note that the Wall Street Journal's report of FOIA's unanimous passage in the House was headlined "'Freedom of Information' Bill Passes House as Bureaucrats Get Some Escape Clauses." The article's only reference to [8], however, was the inclusion of "the files of bank supervisors" in a summary list of the exemptions.[99]

A year after passage, the Attorney General issued a Memorandum to assist agency compliance.[100] The Memorandum's comments on [8] included the House Report sentence just noted, plus this:

> An earlier version of exemption (4) protected trade secrets, but made no mention of financial information and would not have protected information developed by agency investigators and examiners, as distinguished from information "obtained from the public." Exemption (4), as enacted, however, covers commercial and financial information.... Exemption (8) emphasizes the intention of the revision to protect information relating to financial institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions."[101]

C. Since FOIA's Original Enactment

In a sense, this is summed up as "the dog that didn't bark." As noted by a leading secondary source, "[t]he absence of congressional dissatisfaction...is at least suggested by the lack of revision of this exemption in the 1974 FOIA overhaul and the absence from any of the recently introduced bills to amend the FOIA of any proposal that Exemption 8 be deleted."[102]

---

[98] H. Rep. No. 1497, 89th Cong. 2d Sess. 11 (1966), reprinted in *FOIA Source Book* at 32.

[99] WALL ST. J., June 21, 1966, at __. Similarly, an article in the University of Missouri Journalism School's publication said that "special interests were able to convince the Congress to add" [8] and [9]. S. J. Archibald, *It's Codified...But It Is Not Automated,* Freedom of Information Center Report, 6, 7 (July 1967).

[100] Attorney General, United States Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), reprinted in *FOIA Source Book* at 194.

[101] *Id.* at 38, reprinted in *FOIA Source Book* at 237.

However, that comment was written in 1985. Since that time, "the dog has not barked" even louder. Before treating a 1989 effort that succeeded in amending a related law, and a 1991-92 effort that failed, it is important to stress the significance of the dog's not barking in 1976, when some FOIA amendments were made. That year opened with an unprecedented confrontation between a House Government Operations subcommittee (on Commerce, Consumer, and Monetary Affairs) and the bank regulators. This included a subcommittee effort to subpoena specific banks' exam reports; the event is recounted below in Section VII. The author is struck that even that confrontation did not lead, so far as can be learned, to even the introduction of a bill to amend [8].

That same subcommittee was involved in another "dog not barking" event in 1977; though the Members were the same, the matter was entirely different. The subcommittee, concerned about compliance with the Truth in Lending Act—

> considered...whether the overall degree of truth-in-lending compliance should be disclosed to the public. Because truth-in-lending compliance examinations are conducted at irregular intervals and do not cover all the kinds of creditors subject to the Act, the subcommittee concluded that disclosure of overall compliance by individual creditors is a matter that should be studied further.... In States where all creditors are subjected to similar compliance examinations, disclosure...appears to be worthwhile. [Connecticut is considering a disclosure policy.] The subcommittee applauds such efforts and hopes they will provide insights into improving Federal enforcement procedures.[103]

Coming to a 1989 effort to amend [8]: Congressman Conyers introduced a bill to provide for disclosure of reports on federally insured depository institutions "that have been liquidated or have received financial assistance from the FDIC or the FSLIC" and also "reports that provide a federal banking agency's assessment of [an insured] institution's performance under any statute designed to prevent discriminatory lending practices based on race or gender." The proposal's primary target was information on bank compliance with the Community Reinvestment Act of 1977.

As consumer groups and community organization leaders testified and the Congressman put it, "there is no excuse for blocking public access to agency documents that deal with...compliance with consumer protection and anti-discrimination laws." Ralph Nader testified that "[A]t a minimum, [8] should be amended to serve *only* the legitimate interest of protecting the solvency and soundness of financial institutions."[104]

---

[102] BRAVERMAN AND CHETWYND, *supra* n. 26, at 478.

[103] H. Rep. No. 95-280, 95th Cong. 1st Sess., May 10, 1977, at 25.

This effort culminated in amending the CRA, adding the requirement that—

> upon the conclusion of each examination...the...agency shall prepare a written evaluation of the institution's record of meeting the credit needs of its entire community, including low and moderate-income neighborhoods.[105]

The new written evaluation is to have a public section, stating the agency's (a) conclusions "for each assessment factor identified in the regulations," (b) discussion of the facts and (c) rating of the institution and basis for the rating.[106]

As a result of the 1989 CRA amendment, the banking agencies now issue a monthly list of named banks' ratings on CRA compliance;[107] and banks are required to display full signs, on bank premises, announcing the availability of the bank's CRA report.[108] In July 1993, though not a direct result of the 1989 amendment but rather reflecting the public interest in CRA compliance, President Clinton instructed bank regulators "to devise new 'performance based' CRA standards."[109]

The CRA amendment seems to the author precisely the right way to make exam information public. That is, once it is determined that some specific category of information in exam reports should be public, then a special report drawing upon the exam reports (however burdensome such special reporting may be) presents none of the concerns over disclosing exam reports themselves. Also, such special reports facilitate comparability. Still further, they allow routine, easy availability to all potentially interested persons, which is superior for such information to the episodic nature of FOIA availability. Thus, the CRA route is recommended for adapting to any other category of information for which disclosure is sought.

---

[104] The bill's words are quoted from Note, *Developments Under [FOIA]—1989*, 1990 DUKE L.J. 1113, 1116, 1149-51.

Some of the legislative history of the Conyers effort is puzzlingly elusive. Despite thorough hunting by author and Georgetown Law Library staff, it appears that the hearing was never printed. For an account of the hearing, see BNA Banking Report, 6-12-89, 1277. Also, although the Duke Note cites a House Report, no such report has been found.

The proposal about liquidated banks seems not to have gone forward at all until Senator Wirth made a similar effort, see text below.

After the House Committee had not adopted the Conyers proposal to strengthen CRA disclosure, four Members included their dissents in H.R. REP. NO. 101-54(I), on FIRREA (Financial Institutions Reform, Recovery and Enforcement Act), 101st Cong. 1st Sess. (1989), 337-8, 348. The House adopted the proposal, as did the Conference, H.R. CONF. REP. NO. 101-222, Aug. 4, 1989, 432, 499-500.

[105] 12 USC §2906.

[106] The confidential section includes all references that identify customers, employees and whistle-blowers; and statements "which, in the judgment of the agency, are too sensitive or speculative in nature to disclose to the institution or the public." The agency has discretion to disclose the confidential section to the institution, not including any whistle-blower identification.

[107] *See, e.g.*, FDIC News Release, FDIC Issues June List of Banks Examined for Community Reinvestment, PR-82-93, 7-08-93.

[108] 12 C.F.R. §§25.5, 25.6.

[109] *Simplifying CRA*, CONG. Q., July 17, 1993, __.

In 1991 and 1992, Senator Wirth attempted to secure passage of a Bank and Thrift Disclosure Act that did not directly address [8] but instead provided, in its 1992 version, that the agencies would be required to make public the exam reports for the five years preceding a bank's failure or receipt of federal aid. This requirement would apply only to closed banks. Detailed safeguards against improper disclosure were included: a) consultation with the FDIC or RTC was required before disclosure; b) if an agency found that disclosure would seriously threaten an open bank, disclosure could be delayed one year; c) if an agency found an ongoing investigation would be hindered, disclosure could be delayed two years, or longer if a criminal investigation was involved and the Attorney General concurred; and d) all identifying information on non-affiliated persons would be deleted, and on affiliated parties, all information not relevant to the relationship with the bank. The bill also directed GAO to make selective audits of disclosed exam reports.[110]

Senator Wirth stated forcefully the reasons for his bill in the course of a 1991 hearing on the failure of the Bank of New England. [The author has tried to set forth Senator Wirth's position quite fully lest the author's summarization distort, given the author's disagreement with the Senator's proposal notwithstanding agreement with the Senator's concern.]

> Here we have an enormous amount of taxpayer money going down the chute. In this situation, $227 million to seven major borrowers, the public doesn't know who it is.... [T]axpayers across the country...would be outraged by what goes on. And an enterprising Boston Globe investigatory group might want to examine what happened and where $2.5 billion of taxpayer money went.
>
> But they can't find out.
>
> We go to the administration and we say, will you make this information public, and the administration says, no, no, you

---

[110] S. 2290, 102d Cong. 2d. Sess. (1992). The far briefer 1991 version did not include the safeguards. It was offered as an amendment on the floor, Congressional Record, S10371, July 18, 1991. When a motion to end debate was offered, 57 Senators voted against cloture, and the amendment was thereupon withdrawn, S10404. There was no hearing on the proposal either year.

> can't do that. We've tried amendments on the floor and all the Republicans vote against making this information public.
>
> Now what's wrong? Not only...do we have potentially a major coverup going on from the regulators, who obviously don't want this information out because if it comes out, the delinquency that we've been talking about this morning on behalf of the regulators isn't going to be made known.
>
> The public can't find out. It's the public's money and they can't find out, and the administration is stonewalling over there because I'll betcha there are a series of deals being cut in this thing.[111]

In a more confrontational exchange during the hearings to confirm William Taylor as FDIC chairman, Senator Wirth added:

> Now, if stonewalling is too strong a word, I will accept another description of this. Let's say we have heard nothing constructive...from any of the regulatory agencies except [the SEC].[112]

Earlier in 1991, a joint letter from the Secretary of the Treasury, Chairmen of the Federal Reserve System and the FDIC, the Comptroller, and OTS Director, stated their reasons for opposing disclosure of exam reports:

> The examination report can provide a complete picture of a financial institution's health only if the information it contains is complete, and completeness relies on candid communications.... Concern that examination reports might be publicly released at some time in the future would inhibit candid discussion...and would lead depository institutions to deny or rationalize identified problems rather than admit and correct them.
>
> This would damage the ability of the agencies to supervise...because we rely to a significant extent on the candid views expressed in the examination process. In our view, adoption of [the proposal] would ultimately cause a greater risk to the insurance fund and the taxpayer.

---

[111] Senate Banking Committee Hearings, Sept. 19, 1991, at 248.

[112] Senate Banking Committee Hearings, Sept. 24, 1991, at 44.

> Release...could cause undue harm to borrowers and customers. Many borrowers, including those whose loans may be criticized, do not cause losses for a bank. Disclosing the names of borrowers whose loans are criticized...could also impair the ability of a borrower with a single bad loan to obtain credit for other business interests....[113]

In 1992, in a similar joint letter, the agencies said public release "would convert the examination process into an adversarial procedure...." Further, the agencies stressed that under the newly enacted FDICIA section 38k, when an insured bank fails, the primary regulatory agency's Inspector General must review the causes of the failure and the supervision by the agency.[114]

Senator Wirth met the objections to his proposal, as follows:

> Some examination reports will, in retrospect, look bad after an institution has failed. I'm sure there are reports that regulators hope will never see the light of day. Other reports, no doubt, will show examiner warnings that should have been heeded. Lax supervision did play a role in the S&L crisis....
>
> *I agree that examination reports of healthy financial institutions should be private. That's why I have not proposed a broader disclosure requirement for all examination reports....*
>
> We should remember that banks are not a typical private business. They receive significant benefits from taxpayer support and guarantees.... With this kind of government backing, thrift and bank problems are a legitimate public concern....
>
> I agree that customer privacy is a legitimate concern. ...[R]egulators are directed to [redact] the names of customers who are not affiliated [and] information about insiders...if it is not relevant to the relationship between the insider and the institution.

---

[113] Letter to Senator Jake Garn, July 30, 1991. *Id.* at 162.

[114] Unpublished letter to Hon. Chalmers Wylie, Ranking Minority Member, House Committee on Banking, Finance and Urban Affairs, Apr. 9, 1992 (in author's files).

The American Bankers Association, in a letter to Senate Banking Committee Chairman Donald Riegle, said "Unfortunately, in recent years, [the historical] form of give-and-take has been severely restricted, and the examination process has become much more confrontational, even in the case of thousands of well-run institutions in this country. For example, increasingly institutions feel the need to involve attorneys in the process. This change in the examination process has exacerbated the regulatory burden on the industry...." Unpublished letter of March 23, 1992, from Edward L. Yingling, Executive Director, Government Relations (in author's files).

> ...The fact that a report will become public should not affect the role of examiners and bank regulators in this process. If anything, examiners will have a greater incentive to identify problems while bank employees will have an incentive to move to correct them. Public disclosure should encourage no one to hide problems; it only makes the eventual exposure of such efforts more likely. If an institution is disposed to hide problems from regulators, it will try to do so whether we have disclosure or not. If an institution wants to cooperate, the possibility of future disclosure will not make it any less likely to do so.
>
> *Disclosure should not only promote more thorough bank examinations, but also fairer examinations. Some bankers have complained that examiners act arbitrarily....*
>
> Public disclosure can act as a forceful deterrent. Both bankers and regulators should know that the public will examine their actions and hold them accountable when banks fail....
>
> It may not be a bad thing if the examination process changes somewhat as a result....
>
> *Finally, charges that public disclosure will radically alter the examination process presume that examiners and institutions will behave as if a significant number of reports will be made public. This shouldn't be the case. Even in today's climate, most financial institutions don't fail.*[115]

The author disagrees with the corrective step Senator Wirth proposed, for the reasons stated in Conclusions, below, and two additional reasons. First, the proposition that the impact on the exam process will be limited because most banks don't fail, rests on the assumption that only a very small number of banks will fear they might fail, and all others would be unconcerned and so unaffected in their behavior during exams. Second, if one does agree with Senator Wirth's prediction as to the limited impact that disclosure would have on the conduct of exams, then the author suggests the following: Just in case the Senator is wrong and the agencies are right, an experiment should be conducted with some appropriate sample of banks, before putting the entire examination process at risk.

Given the views Senator Wirth was expressing, it seems especially significant that he does agree that examination reports of healthy financial institutions should be private. That's why I have not proposed a broader disclosure requirement for all examination reports.

---

[115] These quotations (emphases added) are taken from Senator Wirth's "Talking Points" document for discussion of S. 2290, generously provided by his former staff (in author's files).

IV. Comparing Bank Exam Reports' FOIA Unavailability with Availability of Other Agencies' Inspection Reports

Although a particular inspection report done by any agency might be exempt from disclosure because of exemption (7), the norm is availability and the obvious question is why bank exam reports should differ. For comparative purposes, inquiry was begun into FAA, FDA, and NRC practices, but full inquiry went forward on only FDA, since the comparison with FDA set up what seemed the key point that would emerge from any comparison.[116] Also, FDA has long been one of the most FOIA-active agencies and in many ways is a model, perhaps the leader, in FOIA compliance and full reporting on FOIA activity. Before noting specific comparisons between the FDA and bank situations, and qualifications on just how available FDA reports are, consider the following example.

Assume that FDA inspectors find serious problems at a drug company's plant, or at a company that is the sole source of a vaccine, or at a blood bank that is the sole local supplier. Assume further that the inspection report (a "483") is very soon after the inspection disclosed to a FOIA-requester, and becomes the subject of news stories. Assume last that many customers of the company or blood bank halt all buying from that source. Serious as the impact on the company itself is, and whatever problems some of the customers may confront, it is hard to imagine any impact on other companies or other blood banks—indeed, the most likely impact is that they gain new customers.[117]

---

[116] Detailed comparative questions were submitted to FDA, FAA and NRC; NRC's answers and material, and substantial FAA material, were reviewed. While there might be marginal gains from full inquiry into those agencies' inspection picture, preliminary review suggested that even if some added value might result, it would be at the price of undue detail and length.

Further, the FAA inspections seemed even more fact-specific than the FDA, thus in a sense comparing bank exams and FAA inspections seems *a fortiori* from the comparison with FDA.

NRC's inspection reports are FOIA-available, but the agency fought and won an eight-year litigation to avoid disclosure of related investigation reports by an industry organization after Three Mile Island, the Institute of Nuclear Power Operations (INPO), *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992)(en banc). About a year after plaintiffs had lost, they published an analysis of leaked INPO reports on 56 nuclear plants in 31 States, and claimed that "[a]nalysis of these documents reveals that the NRC consistently failed to address issues raised in all...areas evaluated by the INPO reports." *Hear No Evil, See No Evil, Speak No Evil: What the NRC Won't Tell You about America's Nuclear Reactors* (December 1993), 1. As a result, NRC received inquiries from Members of Congress, and Chairman Selin responded at length to show that NRC reports and "INPO evaluation differ significantly in their scope and detail. In comparing [the overall assessments of one plant], we conclude that our assessments are in substantial agreement." Letter to Senator Lieberman, March 31, 1994, 1. That comparison, on just one plant, required 25 pages. A second, lesser reason for not going into further detail on NRC was the considered comment of Associate General Counsel William Olmstead, in ACUS Committee discussion, that NRC reports had become more "genteel" since becoming publicly available.

Contrast the situation if the public becomes fearful about a bank. Banks are intricately interdependent, at least as a) in correspondent banking and clearing relationships, b) as depositors in and lenders to each other, and c) as joint holders of loans to third-party borrowers. Anyone at all familiar with bank failures or near-failures knows of the strong ripple effect, sometimes nationally and beyond, more often regionally or only locally—"a chain of risks linking financial institutions and corporations throughout the world...."[118] For example, the Continental Illinois (ConIll) was rescued by the FRB and OCC on the brink of failure precisely because of the fear that a few hundred banks would go down with it.[119] Comptroller Conover said:

> We debated at some length on how to handle the Continental situation.... Participating...were the directors of the FDIC, the Chairman of the [Fed] and the Secretary of the Treasury. In our collective judgment, had Continental failed...we could very well have seen a national, if not an international, financial crisis the dimensions of which were difficult to imagine. None of us wanted to find out.[120]

Indeed, ConIll itself had gone to the brink because of its involvement with loans originated by a small Oklahoma bank, Penn Square, and ConIll's review of such loans was relied on by still more banks participating in those loans. An earlier example includes the failure of a little bank in Germany that severely destabilized foreign exchange markets. And recently when Bank of New England failed, there was a region-wide crisis in confidence not only among depositors but in the region's business generally, as well as international difficulties because of the bank's off-balance-sheet activity.[121] The point is that any public disclosure about one bank, will—not may—impact other banks, therefore other depositors, other borrowers, and other participants in financial markets. It follows that the consequences of a FOIA disclosure about bank X, are dimensionally different from the consequences of similar disclosure about a drug or food company or airline, etc. Which is why we have the special treatment reflected in exemption [8]. At bottom, it is the ripple or domino effect of shaking public confidence in a bank, so different from the firm-specific impacts in other industries, that is the reason why banks are subject to such intensive supervision as well as regulation. It could be argued that this concern is taken too far if applied to exempt every bank from FOIA, but the difficulties of a case-by-case approach seem overwhelming. True, even with that approach, exemption would be clear from the outset for major banks; but a) if information were to remain confidential about all major banks, would the change in exemption [8] be meaningful, since it is regulation of the major banks that matters most? b) On literally thousands of banks it is almost impossible to predict what ripples might flow from failure. c) Ripple effects will differ greatly and unpredictably in different economies (not only national cycles but, say, farm area droughts, or defense cutbacks). d) The competitive impacts of sporadic, "raw" disclosures on some banks compared to only systematic disclosure on others brings an unlevel playing field. e) It is the tiny banks with the least ripple effect that are most vulnerable of all to misunderstanding of "raw" examination evaluations.

---

[117] This should not be read as minimizing the impacts if the affected company is a sole source or, say, a testing laboratory important to many companies. Without at all denying that such situations present acute problems, they are not the norm but the exception.

An industry-wide problem did arise in the notorious "Tylenol scare," because new fears about the security of packaging affected all over-the-counter medicines. But it is hard to conceive of such an event not being public, and that problem drew extraordinarily quick corrective action. I see no general pertinence of that situation for our purposes.

[118] Felix Rohatyn, *World Capital: The Need and the Risks*, N.Y. REVIEW, July 14, 1994, 48, 52.

[119] ConIll held deposits from 2,299 other banks, 976 of which had exposure above the federally insured ceiling. The deposits of each of 66 banks exceeded their equity capital, and another 113 had deposits equaling 50-100% of their equity capital. Hearings on Continental Illinois Corp., House Banking Committee, 98th Cong. 2d Sess., 80, 287, 434-5 (1984).

[120] *Id.* at 287-8.

Several contrasts between the FDA inspection reports and bank exam reports can be drawn. The first contrast bears directly and obviously on the difference in FOIA treatment: FDA inspection reports have far less non-objective and far more factual-type information, compared with the opinion-laden evaluations that characterize bank exam reports. For example, the sole expression of opinion found in a very small sample of FDA "483" reports and "Establishment Inspection Reports"[122] (fuller documents written afterward), was found in a report on an inspection of a Rhone-Poulenc Rorer plant in France. The inspector gave his view of the hotel and restaurant, a recital entirely reasonable, given the location, to facilitate subsequent inspections. But how different from something like the opening of the July 1988 exam report on Lincoln Savings & Loan that states that "[t]he results depict an association that is managed in an aggressive, risk prone manner that has resulted in a level of problem assets that severely strains capital and places the continued viability of the association in jeopardy. Without immediate changes in philosophy, the future of the institution is at risk.... The Board of Directors has failed in its responsibilities...."

---

[121] The "demise of [this] relatively modest sized regional US bank" had international ripple effects because the $33-billion-asset bank also had $36 billion in derivative contracts. "It took many weeks for monetary authorities in the US and abroad to arrange in an orderly way for other investors to take over the contracts and to avoid significant losses to creditors." Rohatyn, n. 116, above.

[122] The "483" reports are one or a few pages, handwritten, that the inspector gives to the "inspectees" when the inspection ends. The "Establishment Inspection Reports" are fuller documents.

Also, the FDA reports I reviewed seem skeletal in important regards. For example, a blood bank inspection report states that the prior inspection uncovered serious deficiencies that may represent a "significant health hazard," and that efforts were made to correct the deficiencies, but that there are still problems, and nothing is said about what corrective efforts were made, or by whom, or how adequately.[123] Or, a much more detailed report that refers to "an overall lack of proper supervision of the facility's operations," gives nothing on the causes of the problems or plans for correction.[124]

The second contrast also bears directly on the difference in FOIA treatment. Unlike FDA inspection reports, exam reports include considerable input from the examiners' superiors, sometimes even their views. Repealing [8] would lead not so much to disclosure as to a mountainous, fruitless task of case-by-case decisions whether other exemptions apply.

The third contrast points up how different bank "supervision" is —to use the word of art these agencies always twin with "regulation"—from other agencies' regulation. FDA "483" reports are given, as an inspection ends, to the highest company representative at the closing conference. Bank exam reports go to boards of directors and are supposed to be discussed by the board, with minutes recording that discussion.[125] Indeed, examiners come to a board meeting to discuss even "clean" exams even at top-rated banks, let alone in all situations that involve even informal recommendations for modest corrective steps. Nor is the supervisory relationship limited to examination reports: e.g., it is hard to imagine other regulatory agencies publishing anything like the OCC's 1987 THE DIRECTOR'S BOOK: THE ROLE OF A NATIONAL BANK DIRECTOR, providing "in-depth, practical guidance for meeting the duties and responsibilities of the job."[126]

This contrast does not necessarily indicate a lower level of seriousness for the FDA reports. FDA-regulated entities are subject to law that includes strict criminal liability. Drug companies are constantly seeking new approvals, and for most FDA-regulated firms, bad publicity can inflict severe competitive injury.[127] But note that exam reports may comment on the competence and/or integrity of bank personnel—including outside directors—who are subject to being suspended and even barred from banking.[128] That adds personal privacy concerns (as noted elsewhere in this study) that cut against disclosure, concerns that at the very least make the redaction workload much more substantial than at the FDA, where—contrary to the image of total openness—it is necessarily significant.

---

[123] Interstate Blood Bank, Inc., 1/7-24/1991.

[124] Plasma Alliance, Inc. 2/21-31/1991.

[125] This should not be read as making the argument (though some might so argue) that the board-level review of exam reports is a self-regulatory safeguard reducing the need for public accountability via FOIA. I reject that argument for two reasons: a) I take as a fact that too many boards are too far from independent, and b) even vigorous, independent boards are supposed to serve the bank and its stockholders, which may diverge from the public interest in assuring vigorous supervision by agency regulators.

[126] *See* George W. Coombe, Jr., *Book Review: The Directors Book*, PREVENTIVE LAW REPORTER, 16 (Summer 1993).

This difference in who receives exam or inspection reports is a notable difference in the two processes. I believe it bears on FOIA availability because it shows that the examiners' aim their reports not only at their own superiors, but at the banks' highest level in order to increase the likelihood that official intervention will be less necessary or, if still necessary, more effective. This is at the heart of bank supervision, and the integrity and bluntness of the messages sent needs to be preserved.

The last contrast shows merely that FDA reports are not as available via FOIA as appears at first blush. FDA "Establishment Inspection Reports"(EIRs) are never sent to the inspected firm, although after some substantial interval they become available via FOIA. The delay in availability is grounded in exemption (7), i.e., until it is clear what if any enforcement action will be taken, the EIRs are not available. Given the understandably microscopic percentage of actions that are even potential criminal matters, and the small percentage that result in any substantial civil action, members of the FDA bar believe that the delay in availability is not justified, but merely reflects differences of enforcement orientation between FDA regional offices and Washington.[129] The delay seems

---

[127] Nonetheless, it seems hard to understand why such reports are not automatically sent to at least the company's CEO, an easy step that could make a big difference in large companies that are always open to the danger that a local or unit manager might try to "work out" problems without risking trouble from superior officers.

[128] If proceedings are brought to suspend or prohibit, that is a matter of public record. But when such proceedings are only under consideration, the privacy concern, let alone the enforcement concerns, are overriding—and within the report itself, there is no opportunity to rebut.

[129] Consider:

Drugs—category of Action	FY 1992	FY 1993
Inspections	3,882	3,846
Adverse Findings	1,974 (54%)	2,242 (58%)
Warning Letters	373 (10%)	501 (13%)
Seizures	43	32
Recalls	524	326
Prosecutions	32	21
Injunctions	7	6

Devices—Category of Action	FY 1992	FY 1993
Inspections	3,120	3,278
Adverse Findings	1,564 (50%)	1,825 (56%)
Warning Letters	547 (18%)	542 (17%)

more puzzling because the substance of the EIR surely is revealed to the company itself in the 483 at the end of the inspection, and the 483 is available within three weeks via FOIA.[130] In any event, whether or not the delayed availability of the EIRs is justified, of course there is a major difference between making inspection reports available a year, say, after an inspection, or much earlier. In short, the less available are the formal 483s, the more EIRs are only "sort of" FOIA-available.[131]

A comparison of FDA inspection reports with bank exam reports shows dramatic differences in what such reports contain. But, even if there were no such differences, the consequences of public disclosure of negative official views of a bank—views, it must always be remembered, that are the "raw" observations, unrebutted, of on-the-scene examiners and their immediate superiors, written with the goal of pressing bank management to make changes—would have negative impacts not only on the examined bank, but on other banks, firms and individuals.

V. Changes in Public Information About Banks

Starting two years before FOIA was enacted, changes in both law and practice have brought into the public domain financial information about banks to an extent that, in an earlier era, was inconceivable. By 1976, Citicorp's chairman wrote that "since...1969, the amount of space in [our] annual report devoted to financial disclosure has multiplied five times."[132]

The first of the four main changes came in 1964. Amendments to the Securities Exchange Act amendments included for the first-time requirements for routine, regulated disclosure to investors and potential investors, by all banks or bank holding companies with at least $1,000,000 in assets and 500 or more

---

(..continued)

Seizures	45	29
Recalls	456	463
Prosecutions	1	3
Injunctions	8	6

Inspections, "Violative" Firms Both Rise as Warning Letters Fall, DICKINSON'S FDA REVIEW, 1 (June 1994).

[130] It is worth distinguishing between the 483 itself (which does not contain any comments by superiors), and the cover page attached by the inspector's superior, stating the superior's recommendation as to what (if any) official action is called for. Understandably, the inspected companies would like to see this, and equally understandably, the recommendation falls squarely within exemptions (5) and (7). For speeding up FOIA availability, perhaps the 483 without the cover page should be immediately available.

[131] Recently it was learned that 34% of FDA "warning letters" (sent after an inspection that finds problems requiring at least that enforcement step), were not FOIA-available although supposed to be. New internal monitoring has begun to end that problem. Dickinson's FDA Review, 1 (June 1994).

[132] William I. Spencer, *The Problems of Bank Disclosure*, THE WASH. POST, Feb. 25, 1976, A15.

stockholders (originally, 750 stockholders). This is examined more fully below, in Section A.

The second change, which was in 1975, involved the near-bankruptcy of New York City. Major banks for the first-time released information about the composition of their municipal bond portfolios.

Starting in the mid-1970's, the bank agencies published quarterly "peer group" data comparisons, making it possible for regulators, bankers and anyone else interested to evaluate a bank's strength and performance compared to institutions that are "peers" because of their comparable size and location (or in the case of multi-nationals, their market). For one example of how revealing such data are, see how they foretold the failure of the Bank of New England, §VIII. Gradually, more and more banks have included peer-group comparisons in their own reporting to shareholders. Such data are digested and disseminated by an army of securities analysts and by firms that specialize in analyzing and publishing all available bank data, not merely for investors but also for large depositors who go to great lengths to stay apprised of the soundness of the banks they use. Thanks to deposit insurance, small depositors have little need for such publications, but they are readily available. For a fuller picture of such comparative data, Appendix 1 presents excerpts from one of the leading firms that assembles and publishes all available data.

Since 1991's FDICIA established new capital requirements, every bank draws unprecedented attention in its disclosures to the amounts and composition of its capital.

Some who would amend [8] seek to increase public information about banks, which they believe is inadequate. In addition or independently, others seek to increase public awareness of regulators' supervision of banks in order to increase regulatory accountability. The first concern can be satisfied by seeing how much information about banks is readily available. The second concern can be satisfied by considering (a) how well regulatory performance can be inferred and evaluated from the already available public information about banks' safety and soundness, and (b) how much better that purpose is served by use of systematic information rather than by such episodic and variable information as exam reports and similar materials. As for bank and regulatory performance on matters other than safety and soundness, we have targeted additional public information, like the special reports on compliance with the Community Reinvestment Act, see Section III-C.

The best way to convey how full the information available on banks now is, and how that fullness has grown and grown, is to list the changes in the annual reports of Citicorp, our largest bank, since 30 years ago. Although that bank's reports are not totally typical of all banks, they are typical of the large banks and, more to the point, they were no more or less typical 30 years ago—so their change demonstrates concretely what has happened to bank disclosure. See Appendix 2.

On every insured bank, a quarterly "Uniform Bank Performance Reports" is available (in paper or computer tape, at low cost), giving not only 13 pages of FDIC data on the bank but also comparing those data to the bank's "peer group." There are 25 such groups for commercial banks and four for savings banks, differentiated by asset size and region; for each group, there is a report on averages (about 310 pages) and on distribution by percentiles (about 390 pages). Also, separate state-by-state reports are available on both averages and distributions. All these reports cover at least the latest quarter and the year-earlier quarter, and the prior five year-end periods.

Consider the differences between episodic disclosure, such as by release of exam reports, and in the alternative systematic disclosure—standardized, routinized, generally applicable and reliable for comparisons—as under securities disclosure requirements or under the bank agencies' quarterly publications on "peer groups," giving several hundred data items for several score different groups of banks, clustered by asset size and location.

Exam reports	Systematic disclosure
a. one-bank	a. peer-group comparison
b. episodic even	b. *all* key aspects; and within single bank routinely released, so far less likely to be misunderstood or sought and used for one-time self-serving purposes
c. focused largely on criticism of matters needing correction	c. just facts, Sgt. Friday
d. judgment calls, with little or no response from bank (often there is response, but in later correspondence, not in exam report)	d. just facts, Sgt. Friday
e. possible errors not only in judgment but even in facts	e. inevitably some typos, rarely worse
f. "raw" info, maybe reviewed closely, but unscreened for public consumption	f. required by law or GAAP, and all data fully screened for comprehensibility
g. varies by examiners, by their supervisors, and by level of openness of bank's representatives	g. uniform

Our securities disclosure requirements (or any standardized disclosure) are the product of collective design and experience, aimed at producing reliable, comparable information for public consumption. In contrast, reliance on single-bank data may be unsound for public evaluation of even that single bank, even if one assumes counter-factually that there are no material differences between examiners, e.g., in level of experience, or thoroughness, or relationship with bank management. The bank may have problems that are its own or its region's or the result of external economic factors; or from one year to another, there may be large differences in a bank's situation; or an exam report done at the bottom of an economic cycle may be very different from another bank's exam only months earlier or later. Even a full-scope exam in one bank may concentrate on aspects different from another full-scope exam (even when the banks are of the same size and CAMEL rating and in the same region), since exams are "risk focused," i.e., exams are not designed for balanced coverage but rather concentrate on problems that surfaced in previous exams or other monitoring. And as mentioned so often, the exam report and any follow-up correspondence are written not for public consumption but to accomplish what the supervisors believe must be said to assure that bank management understands clearly the steps that the agency believes needed to enhance or maintain the bank's level of soundness.

And what of examiners' working papers, what of copies of bank records that become part of the exam records? If exam reports are "raw" information, as the agencies insist, how shall we label such pre-report materials—or more to the point, will they too be available under FOIA, unless found, after record-by-record analysis.

The short of it is that today, there is a veritable Mississippi of standardized data routinely flowing to the public in direct, mandated periodic releases by banks, as well as from reports banks periodically file with the agencies—all compiled and arrayed for comparability and easy use, by a number of private data services, such as Sheshunoff and SNL Securities.

A. Securities Disclosure Requirements

In 1964, amendments to the Securities Exchange Act ended, for banks and bank holding companies with at least $1,000,000 in assets and 500 stockholders, the 30-year-old exemption of banks from the disclosure regime applicable to other corporations.[133] As a result, securities disclosure requirements cover 80% of all bank assets, though that covers only 616 of the 8,518 bank holding companies and independent banks; and covers 64% of the assets of all non-mutual thrifts

---

[133] §12(i), 15 USC §781(i).

(49% of all thrifts), held by 440 of the 458 non-mutual thrifts.[134] Others familiar with banking agree with my sense that the above proportions of assets covered seems lower than we believe to be accurate, but one can say only that we're certain of this much coverage, and it may be even higher.

However, while the SEC directly regulates disclosure by bank or thrift holding companies, non-holding-company depositories are regulated by the primary supervisory agency. Those agencies both administer the requirements and are responsible for promulgating regulations "substantially similar" to those promulgated by the SEC.[135]

Clearly beyond the scope of this paper are such questions as whether the time has come for non-mutual thrifts or small institutions to be covered by securities disclosure requirements; and whether the responsibility for administering disclosure requirements should continue to be divided between the SEC and the bank agencies. Thanks to the thorough 1992 study just cited, ACUS has already given full attention to those questions.

Three other questions are pertinent here. First, as to the "covered" banks, do the securities disclosure requirements suffice, as written and implemented, or would FOIA-availability of supervisory agency documents about those banks serve as a constructive addition? Second, in particular, is the securities disclosure requirement that all material information be made public being satisfied when it comes to statements and informal actions by bank supervisory agencies, e.g., criticism in an exam report or informal recommendations of corrective steps? Third, so long as some banks are not covered by securities disclosure requirements, should agency records on at least those institutions be FOIA-available?

Clear away that last question first. While perhaps some would argue that the non-covered banks constitute a stronger case for FOIA-availability, several reasons cut against that. First, the very fact that these are the smallest institutions makes regulatory performance here inevitably quite secondary to the responsibilities at larger institutions.[136] Second, the nature of such small banks sharply heightens privacy concerns about release of exam reports or similar records, whether the information is about bank customers or bank personnel. Finally, it would seem anomalous to exempt such banks from standardized disclosure, but make them vulnerable to public availability of information that remains confidential for other banks. So we can put aside the non-covered banks, and focus on the covered ones.

---

[134] SNL Securities, Bank Securities Monthly, March 1994, 8; and Monthly Market Report, April 1994, 11. These are the figures for all publicly traded banks and thrifts, including ones listed only in the "pink sheets." Thus the figures on precisely what proportions are covered by securities disclosure requirements may differ, but would increase the figures for all that are actively enough traded to be included here.

Data on the proportions of banks and thrifts covered appear to be completely unknown at the SEC, the supervising agencies, or at other secondary sources.

[135] "This requirement does not apply if the agencies publish...findings and reasons...that implementation of such regulations '[is] not necessary or appropriate in the public interest or for the protection of investors,'" Michael P. Malloy, *Administration of the Securities Exchange Act of 1974 by the Federal Bank Regulatory Agencies*, Report for ACUS (Apr. 1992), at 4.

[136] This is my own view, based on numerous discussions with informed people. Some agency officials and some others have expressed disagreement, even great dismay, at the suggestion that a little

As for whether FOIA-availability would be a constructive addition to the securities disclosure regime, we should start out noting the substantial basis for querying whether those agencies "are adequately fulfilling their responsibilities under" the Securities Exchange Act.[137] Professor Michael P. Malloy concluded that "the system is not...working."[138] Put aside aspects like those agencies' "inordinate delay" in promulgating "substantially similar" regulations (as much as five to seven years [!]).[139] Pertinent to our study is Malloy's finding of—

> a degree of institutional bias against the disclosure approach to regulation...may still be evident in each agency taken as an institutional whole. It is almost a truism of federal bank regulatory law and lore that the regulatory style is one that relies on the confidential resolution of supervisory and enforcement problems, almost to the exclusion of public disclosure....[140]

Although Malloy noted that "the federal bank regulatory system, in certain selective areas, is beginning to rely increasingly on the principle of public disclosure,"[141] there are recent plain indications that the preference for confidentiality may prevail even when it makes little or no sense. Under 1991's FDICIA amendment adding §38 to the Federal Deposit Insurance Act, five capitalization categories were established ("prompt corrective action"): well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized and critically undercapitalized. Each bank agency was responsible for regulations defining those categories. FDICIA also established risk-related deposit insurance, with assessments based in substantial part on the capitalization category.[142] Which of the five capitalization categories a bank falls

---

(..continued)

bank might not get as much attention—even, of course, proportionate to asset size—as a large bank. I cannot help believing that any sound priority-setting, any sound allocation of limited priorities, must attend more to whatever might cause the most trouble.

[137] Michael P. Malloy, *Administration of the Securities Exchange Act of 1974 by the Federal Bank Regulatory* Agencies, Report for ACUS, p. 2.

[138] *Id.* at 34.

[139] *Id.* at 35 and 29-32.

[140] *Id.* at 37.

[141] *Id.* at 39.

[142] FDICIA §302.

in is obvious from data that are fully disclosed. Both that category and the insurance assessment rate are clearly material information and are in fact routinely disclosed in securities disclosure materials. Yet the regulations make the assessment rates exempt from disclosure under FOIA, and prohibit disclosures of capital categories. And the regulations further provide: "Unless permitted by the OTS or otherwise required by law, no savings association may state in any advertisement or promotional material its capital category...."[143] There may be justification for barring use in advertising of information that is routinely available in securities disclosures; but the regulations go further against disclosure, indeed, go so far that they seem unrealistic and understandably not honored in practice.

Such recent indication of discomfort with disclosure only reinforces the bank agencies' long-standing reputation for devotion to confidentiality. As suggested above, that perspective raises concern about whether the supervisors' views of a bank (when those views may not have reached such formal status as an enforceable written agreement, which must be published) are deemed material information that must be disclosed, as often as should occur. A former thrift regulator, leading practitioner C. Thomas Long, poses the problem:

> This concern is exacerbated when one considers that one of the most important influences in the success or failure of a financial institution is the regulatory environment in which it operates (including the impact of particular regulations or supervisory pronouncements on its activities and its ability to comply with those requirements). The tension between disclosure to security holders of all material information on the one hand and the need to maintain in confidence bank supervisory material on the other is made all the more severe when one realizes that the two policies provide negative feedback from a business viewpoint: thus, the worse the impact of an event (regulatory or otherwise) on the financial condition or results of operation, or viability of an issuer of securities, the greater the need for a prompt disclosure to shareholders; on the other hand, the more adverse the information about a bank, the greater the likelihood the adverse information will cause a run or otherwise affect the viability of the institution before regulators can take action to correct it.... This schizophrenic approach to bank regulation and disclosure obligations persists

---

[143] 12 CFR §§327.3(i) and 325.101(e)(FDIC); 12 CFR Part 565.1(e)(OTS).

> to this day, and indeed, can be said to be worse than at any other time.[144]

A recent example of "regulatory materiality" is the SEC's pending administrative proceeding against Bank of Boston for misstating or improperly omitting such material facts as these: An OCC examination in late 1988 noted that the bank's real estate loan portfolio had deteriorated, and in follow-up correspondence, OCC said that the levels of criticized assets were unsatisfactorily high; in early 1989, OCC conducted a targeted exam of the loan portfolio, then recommended corrective steps in the bank's system for evaluating loan risk; and as a result, the bank did take steps that had a material unfavorable impact on the bank's condition and earnings. Yet the bank's discussion and analysis in its disclosure documents used "language almost identical to that contained" in earlier reports, a "mechanical repetition [that] was materially misleading."

Assume, just for the purpose of this Report, that the Bank of Boston example is a typical situation in which there should be more disclosure of supervisory views or steps that don't reach the formal level triggering required disclosure by the agency.[145] Should the fuller disclosure be via FOIA? If our interest is in "prompt disclosure to stockholders," then FOIA seems too fortuitous, the better answer seems to clarify, amplify and/or better administer the standard of materiality. The Bank of Boston situation presses obvious questions: does the standard need change? Is there a need for more effective sharing of bank supervisory information with the SEC, and/or the need perhaps to reconsider whether the bank agencies' supervisory responsibilities are inconsistent with their being primarily responsible for securities disclosure on non-holding company banks? However one answers those questions, relying on FOIA to serve the stockholders' interest would be inefficient and often would not serve at all.

What of the value of FOIA disclosure of such material information to add accountability? Here too FOIA seems too fortuitous. The better answer would be to amend the FIRREA requirement for monthly publication of "any written agreement or other written statement for which a violation may be enforced."[146] If the bank agencies were directly responsible for publishing "any supervisory information that is not otherwise public and is material to the bank's condition or operations," we would get either from the banks' securities disclosures, or from the agencies, all the needed information—and if not, and if foreseeable problems surface later, then the burden would be on the agency to show that it had not fallen down.

---

[144] CAPITAL FORMATION BY BANKS, THRIFTS, AND THEIR CORPORATE AFFILIATES, 2 (1993).

Query whether the need for early disclosure is not substantially reduced by the "prompt corrective action" provisions of FDICIA §131, FDIA §38, e.g. prohibiting capital distributions or payment of fees to controlling persons, or restricting asset growth or affiliate transactions. See the seven-page listing of such provisions in Keith R. Fisher, Mergers and Acquisitions of Banks and Savings Institutions (1993), at 3:141- 147.

Query too how much banks differ from many other regulated firms in terms of the potential for significant "regulatory materiality."E.g., with a public utility, there is also a strong case for full disclosure of the views of both federal and state regulators.

[145] Such an assumption leads at once into line-drawing problems that show the difficulties opened up by treating the supervisors' non-formal steps as "material facts." If a bank's loan portfolio is sub-standard and an examiner says so, is that a material fact requiring timely public disclosure?

Such difficulties need not be resolved here, since deciding issues of securities law goes beyond the scope of this report, and since my whole point is that even if such facts should be disclosed, FOIA is not the appropriate disclosure vehicle.

VI. Bank Exam Reports in the Courts

A. FOIA cases involving [8]

The paucity of decisions about [8] stems in part from the thoroughness, clarity and dispositiveness of the first two appellate decisions. The 21 cases on [8] are listed at the end of this section.

In the watershed decision, the D.C. Circuit interpreted [8] as a broad barrier.[147] The case arose from a FOIA request by Consumers Union for documents relating to banks' compliance with the Truth in Lending Act, after it appeared that examination of New England banks had revealed significant noncompliance. The Comptroller of the Currency denied the request, resting on [8] among other exemptions; but the court decision turned on [8]. The court, after noting that FOIA exemptions are construed narrowly, found "that the documents in issue fit precisely and exactly within the statutory definition."[148] Answering plaintiff's argument that Congress' purpose was only to ensure the security of financial institutions, the court found that the disclosure sought implicated just that purpose as well as Congress's secondary purpose, to safeguard the relationship between banks and their supervising agencies. Further, the court found no evidence that Congress intended a limit on [8]; and that in the course of Congress' 1976 FOIA amendment process, the House Committee had considered whether [8] should apply to Truth in Lending compliance records and concluded expressly that the question needed to be "studied further."[149] In closing, the court noted plaintiff's argument that the result "runs counter to the spirit of the FOIA and to the need for full implementation of credit practices fair to consumers;" noted "suggestions that exemption [8] is both overbroad and superfluous" [citing commentators]; but ended with the lower court's conclusion that "'[i]f this is an unfortunate result, recourse is to the Congress....'"[150]

---

[146] *See* paragraph preceding text at note 28 above. The agencies have discretion to determine that publication would be contrary to the public interest.

[147] Consumers Union of U.S. v. Heimann, 589 F.2d 531 (1978).

[148] *Id.* at 533.

[149] *Id.* at 535.

The *Consumers Union* decision gained force from the reluctant separate concurrence by Judge Skelly Wright, reaching the same result although he found questionable what the majority "casts as inevitable and obviously correct." However, he went on that "the matter is...in serious need of legislative attention" for four reasons: the exemption was "somewhat inconsistent with the philosophy behind FOIA;" the tradition of confidentiality was irrelevant; there were reasons to discount fear of damage to the bank-regulator relationship; and Truth in Lending compliance would be retarded.[151]

The second key decision came one year later, after District Judge Richey had held [8] inapplicable to closed banks—"Congress could not have intended bank records to be forever sealed."[152] Judges Robb, Mikva and Gesell reversed per curiam.

> The exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry.... [L]iquidation may leave a trail of legal controversies.... In view of these practical exigencies, frank cooperation between bank officials and the FDIC is needed. Financial examination into all loans and banking relationships takes place as the agency searches for the causes of the closed bank's distress and negotiates to protect the interests of depositors and borrowers. Congress may be presumed to have been aware that records of these activities require the same protection as that afforded to the FDIC's dealings with open banks under the exemption.[153]

Subsequent decisions about [8] can, with two exceptions, simply be listed, see below at end of this section. The first exception is exemplary rather than important in itself: in an unpublished decision, Judge Oberdorfer upheld a FOIA denial by the FDIC, based on [8], although he found "a bit broad" the agency interpretation that the documents were "related to" exam reports.[154]

The last notable decision is one by the D.C. Circuit in 1991, again involving a denial based on [8] and again sustaining the denial.[155] The issues here turned on whether the National Consumer Cooperative Bank was a "financial institution" for purposes of [8], and whether the Farm Credit Administration was "an agency responsible for the regulation or supervision of financial institutions." The NCCB had been created by Congress to provide credit to nonprofit cooperatives; it received no deposits. The FCA annually reported to Congress on its credit examinations of the NCCB, but had no authority to regulate or supervise it. Public Citizen sought access to such reports.

---

[150] At 535.

[151] At 535, 541.

[152] Gregory v. FDIC, 470 F.Supp. 1329, 1333 (D.D.C. 1979), *rev'd*, 631 F.2d 896 (D.C. Cir. 1980).

[153] *Id.*, at 898-9.

[154] Sharp v. FDIC, 2 GOV'T DISCLOSURE SERV. ¶81,107 (D.D.C. 1980).

[155] Public Citizen v. Farm Credit Admin., 938 F.2d 290 (D.C Cir. 1991).

Rejecting Public Citizen's argument that [8] reflected a concern that disclosure of exam reports could "undermine public confidence and cause unwarranted runs on banks," the court relied on its 1978 and 1979 precedents that Congress's purpose was not so limited. Further, the court noted that NCCB was authorized to issue notes, bonds and debentures and borrow in the financial markets. Since the FCA exam reports "discuss the quality of the NCCB's loans, internal controls, and management practice and structure," these "frank evaluations...may undermine public confidence and investment in the NCCB.... These potential consequences of disclosure may also strain the cooperation...that is essential to the examination process."[156]

In short, the cases have established that [8] has at least these purposes:

1) To protect against undermining the confidence of depositors.

2) To protect against undermining the confidence of investors.

3) To achieve those protections not merely for individual banks, but for the industry.

4) To protect against undermining cooperation and candor between banks and the examiners and regulators.

A fifth purpose is plain from other relevant sources that go back long before FOIA: the protection of confidential information relating to bank customers. See the statutes of 1913, 1978 and 1982, above Section III.A.

All Cases About [8]

The main ones:

Consumers Union v. Heimann, 589 F.2d 531 (D.C. Cir. 1978).
Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980).
Public Citizen v. Farm Credit Admin., 938 F.2d 290 (D.C. Cir. 1991).
Sharp v. FDIC, 2 Govt.Disclos.Svc. ¶81,107 (D.D.C. 1980).

Other cases:

Feinberg v. Hibernia Corp., 1993 WL 8620 (E.D.La.).
In re Sunrise Securities Litigation, 109 B.R. 658 (E.D.Pa. 1990).

---

[156] *Id.* at 293.

Tripati v. US DOJ, 1990 US Dist. LEXIS 6249 (D.D.C.).

Jackson v. First Fed. Sav. of Arkansas, 709 F.Supp. 887 (E.D. Ark. 1989).

FRB v. Teichgraeber, 1988 WL 188328, 1989 WL 32183 (D.Kan.).

Mermelstein v. SEC, 629 F.Supp. 672 (D.D.C. 1986).

Fagot v. FDIC, 584 F.Supp. 1168 (D.P.R. 1984)(bank director and counsel sues FDIC for invasion of privacy and seeks disclosure of documents concerning his work as counsel; summary judgment for defense).

Dannhausen v. First Nat. Bank of Sturgeon Bay, 538 F.Supp. 551, (E.D. Wis. 1982).

Atkinson v. FDIC, 1 G.D.S. ¶80,034 (D.D.C. 1980).

McCullough v. FDIC, 1 G.D.S. ¶80,194 (D.D.C. 1980).

Kaye v. Burns, 411 F.Supp. 807 (S.D.N.Y. 1976)(denying plaintiff's attorney's fees because withholding disclosure had a reasonable basis).

M.A. Schapiro v. SEC, 339 F.Supp. 467 (D.D.C. 1972).

Unpublished and not in LEXIS or WESTLAW but listed in DOJ, Freedom of Information Act Guide & Privacy Act Overview (Sept. 1992), 218-20:Consumers Union v. OCC (D.D.C., March 11, 1980); Folger v. Conover (E.D. Ky., Oct. 25, 1983); Goldberg v. DOJ (C.D. Cal., June 26, 1978); Goldberg v. US (C.D. Cal., June 10, 1976); Wachtel v. OTS (M.D. Tenn., Nov. 20, 1990).

B. Non-FOIA Cases, Involving Discovery of Exam Reports

Another relevant source is worth fuller examination. This is the line of non-FOIA litigations of many types, in which discovery efforts are made to secure exam reports or exam information. As stated in the most significant recent such case, "the courts have long recognized that the report of a bank examiner is protected by a qualified privilege."[157] This 1992 D.C. Circuit decision involved a subpoena by plaintiffs in a shareholder class action against a bank holding company, for exam reports and related material. The trial court had ordered production, saying "I wouldn't turn these over if [the agencies] didn't give it [sic] to the banks.... Everybody has it at the bank, except the shareholders."[158] The court of appeals' reversal noted that the bank examination privilege is not absolute but rather a balancing of such factors as relevance, need, and "the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."[159]

---

[157] *Fleet Financial, supra* n. 15, at 633, citing a 1939 D.C. Circuit decision, which itself referred back to a 1912 opinion of the Attorney General and to 1913 testimony by the Comptroller of the Currency in a House hearing, *see above* at n. 20.

[158] *Id.* at 632-3, 635.

While discovery requests are understandably less frequent than FOIA requests, here too the agencies have governing regulations.[160] For example, the FDIC authorizes its general counsel to produce exempt records in response to subpoenas or court orders so long as the general counsel believes the necessary protection of confidentiality is assured.[161]

Although the agencies often resist disclosure efforts to secure exam information in the course of litigation—claiming an official information privilege—their record of success here is not as complete as in the FOIA cases.[162] Just as many of these discovery cases often cite FOIA exemption [8] simply as statutory recognition of the interests in confidentiality of exam information,[163] the similarities and differences between the discovery situation and FOIA are illuminating. Indeed, the author believes that these differences add persuasively to the case against amending [8].

First, in all instances[164] in which discovery of exam information is ordered, protective orders are entered so that the disclosure is controlled as to who has access and what use can be made of the information.

The parties…have entered into a confidentiality agreement, endorsed by the court…stipulating *non-party* shall be used solely for that information designated as confidential by any party *or* purposes of the litigation and not disclosed to others, and that any confidential information filed with the court shall be under seal.[165]

As one court put it in ordering production of some of the OCC documents sought: "These reports are relevant…and, with the implementation of protective measures, production will not be inimical to the public interest."[166] A magistrate stressed the point:

---

[159] *Id.* at 634, quoting Judge Weinstein, *Franklin Nat'l Bank, supra* n. 16, at 583.

[160] "In 1991, over 75 subpoenas and administrative requests, including requests and subpoenas associated with shareholders' derivative suits, were filed with the (Federal Reserve) Board's General Counsel." Affidavit of Vice Chairman David W. Mullins, Jr., In re: Subpoena Duces Tecum Served on the Board of Governors, Misc. Docket No. 92-0365, Schreiber v. Society for Savings Bancorp. (D.Conn. Case No. H-90-48), at 7.

[161] 12 CFR §309.6(c)(8). *See also* the OCC's, 12 CFR §4.19; the FRB's, 12 CFR §261.14; and OTS's, 12 CFR____.

[162] *See, e.g.*, Principe v. Crossland Savings, 1993 WL 249122 (E.D.N.Y.); Denny v. Carey, 78 F.R.D. 370 (E.D. Pa. 1978); *Franklin Nat. Bank, supra* n. 15.

[163] *See, e.g., Franklin Nat. Bank, supra* n. 16, at 580; Hartigan v. FHLBB, 746 F.2d 1300 (7th Cir. 1984); Matter of Verrazzano Towers, 7 B.R. 648, 651 (Bankr. Ct. E.D.N.Y. 1980).

"Exemption from [FOIA], however, does not create independently any evidentiary privilege…." Denny v. Carey, 78 F.R.D. 370 (E.D. Pa. 1978).

[164] I have found no instance that is even implicitly contrary.

[165] Walsh v. Chittenden Corp., 799 F.Supp. 405, 409 (D.Vt. 1992).

> The documents...shall be held under seal pending further order.... Counsel for the parties and for the Comptroller shall attempt in good faith to agree upon a suitable protective order.... It should be emphasized that the undersigned is not authorizing the public disclosure of these documents.[167]

Second, in discovery situations there has been an adjudicated finding of a specific need for production, even rising to "'the paramount interest of the Government in having justice done between litigants'."[168] In ordering production in a securities litigation over a major bank failure, Judge Weinstein said this:

> Accurate judicial factfinding is [a] predominant [interest]. This factor is powerful in a [securities litigation] situation like that presented here, where no satisfactory alternative source of information exists.... The pendency of criminal proceedings...underscores the indispensability of the Examination Report's account of the past; the principal figures in that prosecution assert their Fifth Amendment privilege against testifying. The Examination Reports thus offer an essential alternative eyewitness view. The information in the reports is relevant to numerous issues in the litigation; the litigant's claim of need is concrete, not abstract.

The judge then gave examples, at length, of that need and relevance.[169] Similarly, another court ordered production of examination information about particular loans (in an action against former officers and directors for mismanagement because of large losses), because the court found the exam reports "extremely relevant" as "one of the key issues in the litigation is how a reasonable person would have assessed the condition of the bank's energy portfolio...."[170]

Third, redaction may be necessary before producing information in discovery situations. But the fact that litigation is under way, often involving the agency as a party, assures a full focus on just what is to be redacted, and assures also that the burden of redaction is imposed for what a court has found to be appropriate needs.

---

[166] *Provident National Bank, supra* n. 12, at 210. *See also, e.g., Franklin Nat. Bank, supra* n. 16, at 589.

The protective order in *In re Sunrise Securities Litigation*, 109 B.R. 658, 667 (E.D. Pa. 1990) gave a large role to the FHLBB's judgment as to what documents required treatment as confidential.

[167] Delozier v. First Nat'l Bank of Gatlinburg, 113 F.R.D. 522, 526-7 (E.D. Tenn. 1986).

[168] *Fleet, supra* n. 15, at 634, quoting precedents.

[169] *Franklin Nat'l Bank, supra* n. 16, at 586-7.

[170] Seafirst Corp. v. Jenkins, 644 F.Supp. 1160, 1162 (W.D. Wash. 1986).

Last, consider the impact of the possibility of disclosure on how examiners write reports in the first place. To the extent that reports would be available under FOIA, the author agrees with the agency arguments that most examiners, most of the time, will be far less likely to write what one District Judge described as "candid opinions, good or bad, correct or incorrect."[171] Instead, exam reports will be written with acute awareness that any report (even batches of reports) may be drawn into the public domain by someone acting entirely on her or his own. In contrast, disclosure in discovery is (1) rare; (2) does not occur until the agency has been heard in court; (3) occurs only because a court has found a need that outweighs the need for confidentiality; and (4) is subject to protective orders.

Thus, the disclosure situation is distinguishable from the FOIA situation in ways that strongly support [8].

VII. Bank Examinations Go Public: Three Episodes

On three occasions the author has found, bank exam reports became public, twice by court clerks' errors and once by a leak to The Washington Post.

The first two are not documented; they can be quickly told. One involved a Federal Reserve exam report produced, pursuant to order, in District Court in Philadelphia.[172] Despite a protective order limiting access, inadvertently the court clerk's office gave the report, upon request, to a Philadelphia Inquirer reporter. The report was about the First Pennsylvania Bank, for a number of years the subject of considerable public interest, and so the report—although it was at least four years old—drew major local coverage. There were no notable consequences. (To document this would require going to the Philadelphia Inquirer files in Philadelphia.)

The second episode involved a small national bank in Alaska in 1980 or 1981. A recent exam report produced under seal was inadvertently placed with other documents available to the public, was found there by a reporter, and here too, drew major local coverage. Again the bank was one about which concerns were widespread, and although a run was feared, no notable consequences ensued. (Whether a trip to Alaska would find relevant files is unknown.)

In contrast, the last episode, in 1976, apparently resulted from a deliberate leak to the Washington Post of the latest (1975) exam reports on Citibank and Chase Manhattan, as well as at least one Federal Reserve Board memo about Chase (reprinted in full). The flavor and some of the detail of the Chase report has been noted above, see Section II.A. The Washington Post banner-headlined story was followed up by more stories (e.g., on Kuwaiti and Japanese deposits) and editorials; vehement statements from OCC, the Federal Reserve Board, the banks, etc.; and Senate and House hearings.

---

[171] US v. Provident National Bank, *supra* n. 12, at 210.

[172] Denny v. Carey, *supra* n. 158, 159.

Citicorp stock, the day after the Post's first story, was the most active issue on the NYSE; after opening down 1 3/8, it closed down 1/2, at 29 7/8. Chase closed down 1/2 at 27 1/2, having opened down 7/8. Both banks reported "no particular problem...no unusual withdrawals by depositors, and no difficulty in raising funds in the money market at the favorable rates usually accorded...."[173] The only subsequent events (apart from much editorializing, and letters, pro and con) were two: (1) the leak or misappropriation was investigated by the agencies and referred to DOJ Criminal Division; and (2) after a House Government Operations subcommittee voted to subpoena reports from the OCC, the full Committee rejected the request "for the first time in the chairman's memory," perhaps in part because the agencies had, for the first time, agreed to a GAO audit.[174]

VIII. Other Matters

A. Should CAMEL Ratings Be Disclosable?

Substantial parts of the argument against disclosing exam reports are that the reports include a) information and evaluations of loans, i.e. about borrowers and b) opinion, often quite subjective, about any (even all) aspects of the bank. Thus, the argument goes, non-disclosure for one thing protects privacy interests of third parties and of bank personnel, and for another avoids inhibiting examiners from writing reports that say what they believe needs saying.

But exam reports have what may at first blush seem an apparently totally objective final bottom line, the single-digit composite CAMEL rating, or the five single-digit numbers for each of the five CAMEL components: Capital adequacy, Asset quality, Management/administration, Earnings and Liquidity.[175] Each component and the composite gets a 1-5 rating, 1 being highest. The CAMEL is not merely the summing-up of the exam report for communication to the bank, but is central in bank supervision. With respect to each specific bank, the rating helps determine the frequency of future examinations and the intensity of off-site monitoring. With respect to the industry generally, the ratings are a clear and constant indication of overall health, valuable not only to the supervisors themselves but to anyone concerned about such matters.

---

[173] Hobart Rowen, *Senate Banking Quiz Set*, WASH. POST, Jan. 13, 1976, pp. 1, A6.

[174] The investigation is noted by Deputy Comptroller Bloom, Hearings, *supra* n. 23, at 16. For the decision against issuing a subpoena, see C. Babcock, *Panel Rejects Subpoena of Data on Two Banks*, WASH. POST, Mar. 26, 1976, A2.

[175] The banks' boards receive only the composite rating.

For fuller statement of the factors that comprise each component, see OCC Examining Circular 159, Dec. 10, 1979 and the attached Uniform Financial institutions Rating System. And for bank holding companies, the Fed uses BOPEC: Bank subsidiaries, Other subsidiaries, Parent company, Earnings, Capital. The last two are on a consolidated basis.

"Management," obviously, reflects much less objective evaluation and factors than the other four components, but there is a spectrum of degrees of objectivity even among those other four: most objective is the earnings component, with the liquidity less objective, the capital still less objective because it may be so effected by the least objective component—asset quality, which includes evaluations of not only the terms and payment status of many loans but also of many borrowers' financial condition, the quality of collateral, etc. Bank rating services' quarterly reports, using routinely available data, do present CAMEL-type bottom-lines for each of the components other than "management," on (from one of those services) 10,833 banks, 1,668 thrifts and 609 savings banks.[176] However, those estimates clearly may diverge from the agencies' actual ratings.

The fact that the rating for "Management" is not a measurable or objective figure although stated as a simple number—and that three other components are somewhere between the objectivity of Earnings and the non-objectivity of the "Management" rating—is only a minor argument against disclosing any or all of the CAMEL, considering the weightier arguments toward that same conclusion.

The first reason against disclosure is that so much of the information is already publicly available, so little would be added. But what would be added—here consider just disclosure of the regulators' view of the bank's management—is the next argument against disclosure: Bank managements already care mightily about their CAMEL rating, even though it isn't public and cannot lawfully be disclosed, precisely because it is the bottom line that stands out in their board of directors' review of the exam report.[177] If the CAMEL becomes public, the bank would have that much more incentive to push, on every arguable or marginal rating, for the better number (if the ratings are public, could the banks use them in advertising?); and worse, the regulators would have to take into account that a low rating may exacerbate a bank's problems—even a mere lowering from prior ratings might do so. As with any categorical rating, inevitably many situations are marginal. In such situations, surely we want the regulators to come down finally with the rating they believe most conducive to preserving and promoting safety and soundness, without any concern about the fact that the rating itself might cause outsiders to overreact to a negative, or less positive, rating.

---

[176] *See* Appendix 1 for excerpts from Sheshunoff Bank Quarterly. All institutions it reports on are federally insured.

[177] For recent appeals of CAMEL ratings to the OCC's new ombudsman, see n. 188 below.

Easily, then, one concludes it would be counter-productive to make CAMEL ratings FOIA-available, given how little would be added by disclosing the ratings, and how likely disclosure would be to work against a key goal of disclosure, probably *the* key goal—promoting vigorous regulatory action to protect the public interest.

But isn't there a valid public interest in knowing how regulators view a bank? At least investors have an interest in knowing such information; all members of the public stand to gain if we encourage banks to compete for favorable regulatory evaluations; and the regulators themselves will have a new incentive to eschew evaluations any more optimistic than publicly-known data warrant. Such reports would be something like the new reports for disclosing banks' Community Reinvestment Act compliance.[178] Having a separate report for public dissemination reduces the likelihood of any gilding or "genteeling" of exam reports to make them fit for public consumption. But here again, I come out (though there is nothing I less like to admit) for the status quo. First, there is an important distinction from the CRA situation: There is a direct and lively local community interest in information about CRA performance, and therefore the disclosure has a genuine audience and good likelihood of promoting better performance. Second, we already have a method for making public material information, including any material change in bank regulators' evaluations: SEC disclosure. If we want more disclosure of such evaluations, the most direct method would seem to be adjusting the definition of "material" to make sure it picks up whatever we want disclosed, as noted in §V.A, above. (Recall that we already require monthly publication, by the regulators, of all formal enforcement actions.[179])

B. Agency Records Other Than Exam Reports

Clear as I find the case against FOIA-availability of exam reports, the diversity of other types of records makes generalization, and thus any conclusion, more difficult. For such records—from exam follow-up correspondence with specific banks to general studies or memoranda (some of which, but not all, may draw on data from exam reports)—the agencies may invoke [8] with a frequency or readiness that reflects their long-standing reservations about the value of disclosure. As noted above in discussing bank agency administration of securities disclosure requirements, few if any observers view these agencies as disclosure-oriented.

---

[178] *See* §III.C. above.

[179] *See* paragraph preceding text at n. 28 above.

But we face two questions: How to decide whether, when [8] is invoked to withhold records other than exam reports and similar material, the invocation was correct; or, more to the point, how to decide whether [8] is used relatively often or relatively rarely to withhold records of a type that other agencies would disclose? Second, even if [8] were invoked more than is proper, how do we draft the amendment of [8] that would cut back some protection but preserve it where it is needed?

Appended to this report is a letter from one FOIA requester, former Congressional aide Jake Lewis, who believed that his request for a study was improperly denied. Assume arguendo that he was right: of course a single matter doesn't make the case for amendment. Rather, one would need a review of a substantial sample of records on which FOIA requests had been denied. Assume that I, or I and a member of the ACUS Committee or staff, were to undertake such a review, would we be able to form a judgment about the four agencies' FOIA administration that would be clear enough and defensible enough to advance the dialog, let alone to make the case for or against amendment?

When substantive categorizing seems unmanageable, administrative lawyers naturally turn to procedural devices. That is why requests that have been denied may be appealed within the agency. In fact, about one-third of the denials based on [8] are appealed, and over two-thirds of those appeals are successful (see Appendix 3). If the availability of appeals is deemed insufficient, perhaps the agencies might follow OCC's lead in having an ombudsman,[180] and OCC's ombudsman and any others might be authorized to handle not only "appeals" from regulated institutions, but also from FOIA requesters and other citizens.

C. What of Closed Banks?

It is imperative to avoid the error of hindsight in considering the closed-bank situation. There is no sign over any bank that X years later, it will close—which means that exchanges will be inhibited in many, many more banks than will in fact ever close. In addition, it is especially when closing is imminent or has occurred that there is particular need for candid communication from bank personnel, for four reasons: sound wind-up of that bank's affairs; sale of the bank and/or its assets at prices and a pace that protect the deposit insurance fund; possible civil litigation over the failure; and possible enforcement actions against some of the bank personnel.

---

[180] *See* n. 188 below.

Braverman and Chetwynd, quoted below (§X.A), note the overlap between [8] and exemption (4) but conclude that closed-bank information needs protection

> to promote cooperation between the failing bank and its supervising agency at a time when the need for candor and cooperation is particularly acute and in recognition of the sensitivity that data relating to a closed bank may have in the context of the bank's liquidation and the legal controversies that may clothe the bank's demise.[181]

Another twist usually overlooked in thinking about closed banks is that often three agencies are involved: for national banks, OCC and FDIC and, if the bank is large, the Fed and the relevant Reserve Bank because of potential lending to the bank from the discount window; for state member banks, the state agency, FDIC and again, possibly the Fed and Reserve Bank. The exchanges among those agencies are separable from exam reports themselves, but largely inseparable from the information in exam reports. Perhaps exemption (5) would apply to some of those exchanges; certainly there is value in protecting candid exchanges in such situations, sometimes crisis-laden, always delicate. And certainly the notion that the closed-bank setting is a simple one, for which [8] is unneeded or even inappropriate, seems wrong.

Of course a bank's being closed eliminated many of the reasons underlying [8]. By no means does it eliminate all. Florida's new statute may well help us reconsider the closed-bank situation, but it is too new to help now. And last, the best reasons for getting disclosure about closures have led to the new safeguard treated in the next section.

In our Committee discussions, one member said that there is no reason to fear that disclosure of reports of failed banks will cause the report to be written more gently for public consumption, because the examiners' obvious incentives are to be tough. I agree with that, as far as it goes. But that misses three crucial matters.

First, examiners and supervisors engaged in coping with a problem bank, which by definition may well fail, seem bound to be affected by the fact that their report will be public if failure occurs. Thus, they have no incentive to "genteel" anything, but what of their incentive to show how tough they were? Problem bank situations present terribly difficult judgment calls, i.e., how much to toughen, how much to forbear, where if anywhere to be flexible. Even if potential release would not inhibit examiners' calling the shots as they see them, surely it would cause more measured, slower action just when the need is most acute for best judgment decided and stated quickly.

---

[181] *Id.* at 482.

Numerous major banks, healthy today, like Maryland National, Midlantic and Shawmut, survive because the supervisors made the right calls in such situations. Given the terrible difficulty of such situations; given the fact that every notable failure is the subject of public reports by IGs; given GAO's particularistic oversight on such situations—given all that, is there enough gain in making public the exam reports themselves? The gain must be great enough to justify risking some failures that may occur because the impending public disclosure may add, in the time-constrained cauldron of tough calls, unprecedented concern among the regulators about c.y.a.

Second, people unfamiliar with exam reports may not appreciate all of what is meant by calling the reports "raw information." Examiners occasionally make mistakes, sometimes improperly and unfairly faulting persons or practices. (One concise, simple, clear example of error: I have seen a report that faulted a bank for holding funds in a money market mutual fund, because—the report said—that fund might be volatile. That examiner thought all types of mutual funds were the same; and this was several years ago, before the devilish derivatives fell upon us; and the fund in question was as solid as money market funds get.) Any banking lawyer can give striking examples of errors in reports.

If failed banks' reports were released, simple fairness (and perhaps due process) would seem to require that any such reports may be accompanied by a response from the bank/bank officials. At present, such responses are written for agency-eyes-only; much redaction would likely be needed. And if there are such responses, won't they be written with an eye toward future litigation, not only with the agencies but with private suits? (And if the agency wanted to spend the resources, could it respond to the response?) Last, remember that often three agencies are involved when a bank is on the brink—which surely compounds these problems.

Third, many agency lawsuits after a bank failure are settled, with the bank and/or its officials more willing to settle because they prefer to keep some of the facts out of the public eye. If the reports are going to be made public automatically, there will be less incentive to settle. Is the FOIA gain worth the public's loss in quicker and perhaps better settlements that are sought to benefit the public?

Florida's new statute may well help us reconsider the closed-bank situation, but it is too new to help now. And last, the best reasons for getting disclosure about closures have led to the new safeguards treated in the next section.

IX. New Safeguard Against Regulatory Laxness: Review by IGs

Since 1993, if a depository institution fails and causes a material loss to a deposit insurance fund, the inspector general of the relevant regulatory agency must review the agency's supervision to 1) ascertain why the failure resulted in a material loss to the fund, 2) make recommendations for preventing such losses in the future, and 3) make its report public.[182] Two such reports have been done, one on a FRB-supervised bank that failed the day after this requirement became effective, the second a "Pilot Loss Review" by the Treasury Department's IG on a thrift that had failed in 1991. In addition, this section considers the learning from earlier bank failures.

This section aims at two questions. First, given the information newly available in such IG reports, what do we learn about whether failures and losses might have been avoided or reduced if there had been public access to the exam reports or other materials? Second, how well does the new IG report process work to reveal regulatory flaws that may have contributed to the failures? A major basis for the advocacy of amending [8] has been that public disclosure will operate to improve examination and supervision: the public would be able to point to regulatory laxness or breakdowns, whether it be supervisors who fail to follow up on problems found by examiners, or inadequate examination in the first place. Of course the advocates' goal is not to discover where to point with blame, but rather to encourage regulators to do more to prevent problems.

Although it is not within this report's task to evaluate the new IG review process itself, some such comments may be needed and in any event are inevitable. Both IG Reports include responses, and concurrence—and in the case of the FRB, some disagreement—from the relevant officials. Both agencies had already taken, or are taking, corrective steps. (On a few lesser matters, differences between the FRB IG and FRB staff were left unresolved, which is immaterial if the FRB's follow-up is as expected.)

The 1993 bank failure was caused by a major criminal fraud by an investment adviser to the bank, evading detection by full-scope and also properly targeted exams as well as off-site monitoring by Reserve Bank and Colorado examiners; Price Waterhouse also missed the fraud, as did many other customers of the perpetrators. The IG found the level of supervision appropriate though it faulted the examiners for failing to identify "weakness in the bank's internal controls," going on to stress that "because of the nature of the fraud, there is no guarantee that it would have been uncovered even if our recommendations had been in place prior to [the] failure."[183]

---

[182] FDICIA (the Federal Deposit Insurance Corporation Improvement Act of 1991) §131, adding a new section, "Prompt Corrective Action," §38(k), effective for material losses occurring on or after July 1, 1993. A deposit insurance fund loss is "material" if it exceeds the greater of $25,000,000 or 2% of the institution's assets when assistance began. §38(k)(2)(B).

I see no way in which simple public disclosure of either the exam report or any other documents noted by the IG, would have helped, even marginally, to avoid the loss or improve regulation. (However, if bank-regulatory disclosure requirements included public reporting on two points that seem worthy of such disclosure, that might have helped in this situation and certainly might prevent recurrences. This point is treated below in my fuller comment on that situation and that IG report.)

As for the 1991 thrift failure, "FHLBB could have been more proactive in its supervision.... Specifically, FHLBB examiners should have identified and curbed [the] poor lending practices.... Such identification would have permitted FHLBB to initiate enforcement actions sooner than actually occurred."[184] This thrift's failure was a classic of its era: high concentration in high-yield, high-risk construction and real estate loans; a board dominated by a real estate developer; rocket-like growth from its 1981 beginning with $3 million in assets, to $1.4 billion in 1989; income primarily from loan origination fees; deposits that as early as 1982 were over 80% in high-rate jumbos. Last, "FHLBB examiners were ill-prepared and overwhelmed by the sophistication of new lending and investment schemes. There was also a shortage of skilled examiners as low salaries and a growing industry drained the available pool of talent to supervise the increasing number of problem thrifts."[185]

Here too, I see no way in which fuller public disclosure of bank agency documents would have helped. It is crucial to note that just before this thrift's explosive growth peaked, it became publicly traded. Thus, not only were the key data that would have shown trouble—concentration of assets, sources of income, cost of deposits—readily available to any member of the public, but there was substantial incentive for members of the public to monitor the thrift's health. (If any of the key data were not available, that is a flaw in SEC requirements that calls for correction directly, not via FOIA.) In fact, the thrift's stock price alone signaled the trouble. The initial offering was in August 1986, at $9 per share; the failure occurred in March 1991. Consider the clear message from these stock prices for County Federal Savings Bank, Santa Barbara:

---

[183] FRB Office of IG, Report on the Failure of Jefferson Bank & Trust, opening letter to Chairman Greenspan (December 1993). The estimated loss to FDIC: $41 million.

[184] Treasury Dept. Office of IG, Pilot Material Loss Review Under FDICIA: County Federal Savings Bank, Santa Barbara, Calif., letter to OTS Acting Director, 2 (March 1994). RTC estimated the loss at $176 million.

[185] *Id.* at 20.

Date	Price
Year-end 1986	$6.00
Year-end 1987	$4.75
September 30, 1988	$4.00
Year-end 1988	$2.75
September 30, 1989	$3.875
Year-end 1989	$1.875
September 30, 1990	$0.75
Year-end 1990	$0.50.

Further, the IG's finding that the supervision and examination should have been better than they were, warrants only two comments. First, as noted above, this failure was a classic of that awful era. Second, as the IG concluded, "The many supervisory policy and procedural improvements made since these two deficiencies occurred should prevent their recurrence."[186]

Even if the reader agrees that in those two situations, FOIA would not have helped at all, the reader may be concerned about the sufficiency of the IG review process. That is, how well does this change in our legal structure buttress the efficacy of regulation? I believe the new "Prompt Corrective Action" requirement of IG review does reduce the case for amending [8]; and since I have had to examine the IG Reports, a few further comments seem appropriate even if I risk going beyond my task. Comment may be brief indeed on the Treasury IG's Report, given that it evaluated a failure caused by problems that were terrible but on which the barn door has been rebuilt. To the above, one can add only the conclusory view that the IG's Report is exemplary in its thoroughness and pointedness.

The Report on the 1993 bank failure, also exemplary in thoroughness and pointedness, seems understandably more notable. Before specifying the regulatory weaknesses to which the FRB's IG pointed, let me stress that the IG's conclusion seems unassailable: the fraud might have succeeded even without these weaknesses. Nonetheless, the flaws allowed "weak controls over [the bank's] investment and trading activities" to "create an environment that [the perpetrators] were able to exploit."[187] First, the flaws above and beyond the particular exam: 1) The concentration of assets involved in the trading account were "well above supervisory policy limitations," one of several "examiner red flags" as the IG called them,[188] one that should have cried for supervisory intervention; 2) The Board's Commercial Bank Examination Manual was obsolete in that it failed to make clear that trading accounts needed as full examination and safeguards as investment accounts; 3) Reserve Banks could cut back on examination steps set forth in the Manual; 4) This Reserve Bank had eliminated steps not pertinent "to a majority of the banks." But the Bank, its examiners, and even the IG, failed to see that however sound a generally-applicable cut-back might be, steps unnecessary at most banks might be crucial at banks that differed from the majority; 5) Reflecting an attitude and approach rather than flawed policy or process, when asked why there had been no follow-up inquiry into the bank's high dependence on trading profits for its earnings, "the examiner replied that...she was looking at the securities gains from an earnings perspective, i.e., how the bank's earnings were improving and how the securities were contributing to that improvement, rather than from a trading perspective."[189] One would think that it would be no news to anyone remotely involved in finance, that trading profits today may be trading losses tomorrow; yet even the FRB staff's response to the IG seems to believe that since the trading involved U.S. Government securities, there was little (or at least less) danger. Last, coming to the specific exam, there were serious flaws but Price Waterhouse's audit suffered similarly (it was a limited-scope audit, but that does not exonerate for these flaws).

---

[186] Report, *supra* n. 3, at 2.
[187] *Id.* at 78.
[188] *Id.* at 16.

(The failure might have been avoided, or minimized, if bank-regulatory or SEC disclosure requirements included public reporting of two points that seem worthy of such disclosure, and which might have helped in this situation, and which certainly might prevent recurrences. Specifically, the bank had a board audit committee chaired by an employee of the outside investment advisory firm responsible for the large activity that turned out to be fraudulent; the bank had no other internal auditing.[190] Second, the activity that turned out to be fraudulent involved 29% of the bank's assets, a concentration the IG deemed "well above the supervisory policy limitations."[191])

---

[189] *Id.* at 63-64. As noted earlier, the IG reports included responses from agency staff. One of the FRB staff response's points was that this item had nothing to do with the bank's failure, and involved only the unwinding of a repo.

[190] FDICIA requires audit committees comprised of directors independent of management; for banks with more than $3 billion in assets, the audit committee members must have relevant expertise and cannot be large customers of the institution. Query whether "customers" is defined broadly enough to keep audit committees free of persons like the trouble-maker here.

There is an obviously strong case for public disclosure of loans to, and also "related interests" of, banks' key personnel. At present, public disclosure is required for loans in amounts greater than $500,000 or 5% of the bank's capital (whichever is less) extended to executive officers and 10% stockholders, but that does not cover non-loan "related interests," 12 CFR 215.11(b). In addition, banks must keep non-public records of extensions of credit to directors, executive officers, and 10% shareholders, §215.8. In addition are the SEC proxy rules.

The above requirements may be too narrow to meet the obviously strong case for disclosure: apparently there is no public disclosure requirement indicating, e.g., in the case of key directors, what other relationships they have with the bank. But the answer, even more obviously, seems not to lie in resort to FOIA, but rather in amending the disclosure regulations to provide uniform disclosure assuring uniform treatment and therefore comparability, thus the greatest likelihood of reducing problematic conduct.

Summing up, the new FDICIA requirement of IG review holds promise, well borne out by the first two IG Reports. And going by the situations covered in these Reports, it seems that FOIA disclosure of exam reports and related documents would do nothing to reveal regulatory inefficacy or laxness.

However, two "buts...." First, "[b]ut review by IGs isn't as independent as is needed for this kind of matter." That is a reasonable view, since every effort to assure accountability has some strengths and weaknesses. Consider FOIA availability: a) How much would availability of exam reports improve oversight of bank regulators—how much would fortuitous disclosure of situation-specific details add, given all the data already available on banks, data more objective than any exam report on just how well the bank is faring vis-à-vis its peers? b) Would there be enough improvement to outweigh the problems that come with making the reports publicly available? Though the IG review seems to me a clear step forward, I would agree with anyone who argues that it does not suffice. But as I see it, if there is to be additional oversight—and surely there is a strong case for more than after-the-failure analysis of what went wrong—it requires something like an advisory committee bringing a mix of expert, systematic and independent review, rather than the fortuitous and episodic.[192]

Second, "[b]ut two IG reviews are surely too little basis for any general judgment." Undeniably—indeed, the GAO entitled a 1991 report, *Bank Supervision: OCC's Supervision of the Bank of New England was Not Timely or Forceful.*[193] It is sadly true, not only about one bank or one agency, that bank regulation (not merely examination) in the 1980's was not admirable, a tale that needs no re-run here. But our question is what light those situations throw on whether FOIA availability would help. I submit that the answer to that comes from the facts that the public already has more than enough data on banks to be on notice that X bank is sliding or in trouble. Consider the following on Bank of New England, which failed in January 1991:

---

[191] *Id.* at 18. Here again, there may well be a case for requiring disclosure of, e.g, concentrations above (say) 20% of assets, but again, that seems not at all as susceptible to revision by changing FOIA, but rather calls for consideration of changing regulations on routine disclosure.

[192] An outstanding recent advance was the Comptroller's 1993 appointment of an Ombudsman reporting directly to the Comptroller and empowered to supersede—with the Comptroller's consent—any agency decision or action in appealable matters. In 18 appeals filed by banks, they have won six full successes (e.g., two up-gradings of CAMEL, two up-gradings of CRA ratings) and two partial successes. OCC, Appeals Process, 13 Quarterly J. 61 (March 1994), and up-date from Rosa Koppel, OCC Litigation Division Assistant Director, July 21, 1994.

Certainly ACUS and any administrative law academic applauds the creation of such an office, and it detracts nothing from that applause to note that this step forward is almost entirely different from the kinds of steps sought by proponents of FOIA availability to make the process more open and more accountable to concerns of affected persons other than banks. A 1994 statutory provision requires each Federal banking agency to appoint an ombudsman. Pub. L. 103-325.

[193] Report GAO/GGD-91-128, to the Chairman, Senate Banking Committee, September 1991. As recently as February 1993, GAO released critical reports on Bank Examination Quality at each of the four agencies, e.g., OCC Examinations Do Not Fully Assess Bank Safety and Soundness. The reports are summarized in Bank and Thrift Regulation: Improvements Needed in Examination Quality and Regulatory Structure, GAO/AFMD-93-15. My experience with GAO reports, specifically on bank regulation since about 20 years ago as well as more generally, keeps me from regarding such reports as gospel. Recalling my work on bank regulation years ago, including work with Senator Proxmire's and

Stock Prices (closing bids)	Real estate loans (% of assets)	Const. & Dev. loans (% of assets)
	...as percents of same at peer banks...	
	end-1984: 48%	end-1984: 72%
	1985: 60%	1985: 90%
end-1986: $32.75	1986: 8%	1986: 124%
1987: 25	1987: 155%	1987: 149%
1988: 22	1988: 155%	1988: 190%
Q3, 1989: 20.75		
end-1989: 9.38	1989: 27%	1989: 208%
Q1, 1990: 4.63		
Q2, 1990: 3.13		
Q3, 1990: 1.63		
Q4, 1990: 0.69	1990: 148%	1990: 248%

Comparative data like those fill 14 small-print pages, but no one needs anything more than the last two columns to know—and be warned—how much farther than comparable banks BNE went into real estate loans, particularly into the riskiest type of such loans. No more information was needed to explain the stock price slide, i.e., that BNE had made a bet on real estate dramatically different from peer banks, and if New England real estate turned down, BNE might well too.

Such comparative data are available on all banks, and in addition SEC disclosure requirements apply to all banks that have above $1,000,000 in assets and 500 stockholders. (See Section V.B.) Those data on Bank of New England

---

(..continued)

Congressman Reuss's Banking Committees (including testifying before Proxmire on a GAO study of bank examination), I cannot help reading with total deja vu—to GAO's credit—their 1993 studies' emphasis that "the foundation of the supervisory process is anticipatory supervision, requiring a thorough knowledge of the bank's policies, procedures, practices and controls.... [E]xaminers did not comprehensively review controls at 13 of the 14 large banks sampled or at 6 of the 7 small banks...." Report GAO/AFMD-93-14, at 3. "[R]egulators thoroughly reviewed internal controls for only 1 of the 58 bank and thrift examinations it reviewed." Report GAO/AFMD-93-15, at 5.

Assuming one concluded that GAO was more right than wrong and that bank examination still suffers from the severe flaw of underemphasizing banks' control systems, I can only repeat the point in text above: if any help from outside the agencies is sought, it should be "expert and systematic" as well as independent.

are here to exemplify the objective, unarguable information already public, giving more than enough to alert the public so they may protect themselves and so they may hold the regulators' feet to the fire. And as much as public disclosure can serve as an incentive for vigorous regulation, it already is in place on all banks and thrifts of any size. Whatever the reasons some bank may fall from health, the regulators already know that their performance is on public view every time.

Let us turn from the handful of four failures noted above to a sample studied in *An Evaluation of the Factors Contributing to the Failure of [171] National Banks* by OCC in 1988, covering also 51 rehabilitated banks that went through similar circumstances as well as 38 banks healthy throughout the same period. The study has one finding that may be surprising and certainly is illuminating. Its main findings are unsurprising. At the failures, examiners had found: 1) nearly 60% had uninformed or inattentive boards, compounded by over-aggressiveness at 80%; 2) CEOs "clearly lacked the capability, experience or integrity necessary," at 63%; 3) insider abuse was significant at 35%; and 4) 73% operated in significantly depressed economic conditions, another 15% in marginally depressed conditions. In short, internal rot and external storms can be fatal.

That study's illuminating finding—at first perhaps surprising, but not after a moment's reflection—stems from the fact that OCC had taken administrative action against almost identical proportions of the failures and the rehabilitated banks.

	Failures	Rehabilitated
Memorandum of understanding	14%	12%
Formal agreement	46%	47%
Cease and desist order	75%	69%

But 59% of the failures were guilty of unacceptable degrees of compliance with the administrative action, compared to 14% of the rehabilitated banks. Only 6% of the failures complied acceptably, compared to 45% of the rehabs. This differential in response to forceful supervision offers two lessons. The first lesson is relevant to banks and regulation, but not our purposes: internal rot in the midst of external trouble is not easy to turn around.

But the second lesson seems important for our project: some banks in trouble will go down, some can be brought back by a combination of internal resilience and supervisory vigor. How would the potential for rehabilitation be impacted by public disclosure of examiners' negative reports? I can see no reasons to believe that publicity would increase the likelihood of rehabilitation, and several reasons to believe that it would hurt.

By no means does this leave the public shielded from the facts about banks in trouble. Rather, the public gets not merely signals but all the information it needs, thanks to a) the securities laws' routine, full, systematic and objective disclosure system; and b) monthly publication of all supervisory written agreements, cease and desist orders, and other immediately enforceable supervisory actions.[194] What the public does not have are exam reports and follow-up correspondence, materials that are almost entirely the mere "raw" findings and judgments of the examiner on the scene and her immediate supervisor, materials written with the aim of pressing bank management to make changes. Once again, I submit that making such documents public will either damage the banks, their personnel, their borrowers—and other banks, etc.—or in order to avoid such damage, the documents will be written differently with the inescapable consequence that the agency will find it harder to convey to the bank the facts and the judgments that they most need to be told, forcefully.

We have episodes showing how well any interested persons know of problems at specific banks. As Congressman Jim Leach said in hearings only days after The Bank of New England failure,

> everybody in the industry knew [it] was bordering on insolvency. I mean everybody. Without listing the name of the bank, even the statistics your agency puts out indicated that in all probability this bank would have to be dealt with.[195]

Or 20 years ago, when The Washington Post front-paged exam reports on Citibank and Chase Manhattan that had been leaked, John Kenneth Galbraith wrote that "streetside information" had led him to write, before the Post stories, an almost identical article—"I had not the slightest thought that I was being original."[196]

X. Should [8] be Repealed or Amended? If it Were, How Much Difference Would That Make?

A. Scholarly Commentary

Commentary on [8] has been brief indeed: Two comments in passing, the year after enactment, by Kenneth Davis and a student note; and two more in current treatises on disclosure.

---

[194] The appropriate bank agency is to publish monthly any written enforcement agreement, statement, or final order, unless the agency finds publication "contrary to the public interest." 12 USC §1818(u), P.L. 101-647 (1990).

[195] Hearing, House Committee on Banking, Finance and Urban Affairs, Jan. 9, 1991, at 49.

[196] *Supra*, n. 13.

The inimitable Davis treatment:

> We must be extremely careful or the facts about financial institutions might become known! We want the public to know the truth about almost all our institutions, but not about our financial institutions! At least, so says Congress, and what it says is the law. What it says is also in keeping with banking tradition, although that tradition rests heavily on facts of a former day such as uninsured bank accounts and runs on banks. The law is clear, but I still wish the lobbyists for the banking agencies had been less effective.
>
> My opinion is that Congress should not have provided that such a report is exempt from required disclosure. The other banking agencies are similarly maintaining systems of secret facts, secret law, and secret policy, and the eighth exemption will encourage such tendencies.
>
> The eighth and ninth exemptions, about financial institutions and wells, respectively, are both broader than is necessary to accomplish their purposes.[197]

And a Georgetown Law Journal note:

> While this [narrow exemption…may have been a significant limitation in the version of the bill first introduced into Congress, the amendment of exemption (b) to include 'commercial or financial information' made this section superfluous.[198]

"[A] superfluous holdover" is James T. O'Reilly's label for [8], as recently as last year:

> The exemption may have outlived its usefulness as the bank and savings and loan problems of the late 1980s cost taxpayers billions of dollars. The actual condition of a financial institution would be highly relevant to consumer confidence, as all agree. Proponents of change argued the relevance is so great that disclosure represents a more appropriate balancing of the competing interests; with disclosure, better follow-up of inspectional observations will occur and greater confidence in bank regulatory agencies will be fostered. Opponents cited the

---

[197] K.C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 801, 807 (1967).

[198] Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO.L.J. 18, 50 (1967).

> need for candor in frank evaluations of the bank conditions.... [C]hange at some future point will occur, for the erosion of public confidence in financial institutions has eroded any claim that special benefits to the public arise from the retention of this special interest exemption.[199]

Similarly, Burt Braverman and Frances Chetwynd:

> There is no doubt that Exemption 8 overlaps substantially with Exemption 4.... One explanation that has been offered is that initially Exemption 4 protected only trade secrets.... [I]t is important to note that [the final version] will not always overlap fully; there are circumstances under which information covered by Exemption 8 might not be protected by Exemption 4. For example, where disclosure of information concerning a closed bank is sought.... Thus, [Exemption 8] is not superfluous. Furthermore, the absence of congressional dissatisfaction with this overlap is at least suggested by the lack of revision...and the absence from any of the recently introduced bills...of any proposal that Exemption 8 be deleted.[200]

B. [8] in Relationship to Exemptions (4), (5), (6) and (7)

The issue those views pose is this: If [8] were gone, to what extent would exemptions (4), (5), (6) and (7) replace it as the basis for denying requests for documents presently covered by [8]?[201] It seems clear that most, or at least a great deal of the records currently covered by [8] would still be subject to withholding under other exemptions. Some would not: Closed-bank information would fall outside whatever coverage exemption (4) might provide for open-bank information; and information about compliance with such statutes as Truth in Lending and the Community Reinvestment Act might well fall outside any exemption other than [8].

---

[199] FEDERAL INFORMATION DISCLOSURE (2d ed.), v. 2, pp. 18-3, 18-4 (1992).

[200] INFORMATION LAW, v. 1, 477-8 (1985).

[201] Exemption (3) is not a likely basis, as shown by a change in agency position during FOIA's enactment, §III.B above. In 1963, the Treasury general counsel noted another statute in passing, repeated in a Treasury statement in 1964, to support the argument that Congress had recognized the importance of confidentiality for bank agency records, thus providing a basis for withholding bank agency records under exemption (3). But Treasury cited only the Federal Reports Act of 1942. In the subsequent stages of the legislative history, the reference was not repeated, nor was there any other reference to any other statutes. And that once-mentioned statutory provision is no longer law.

Consider first the information that would be substantially covered by other exemptions. If repeal of [8] resulted largely in simply shifting the basis for denying disclosure to other exemptions, two questions arise:

1. Would repeal be worth the effort? That depends on one's view of how valuable it would be to have publicly available whatever would not be covered by those other exemptions. Also, of course, repealing [8] might go beyond mere excision of the current exemption. Instead, there might be a new provision directing explicitly that certain categories of documents would no longer be exempt.

2. After [8]'s repeal, any records that would or might fall under the other exemptions most likely would involve record-by-record evaluation, instead of the current categorical blanketing by [8]. Administrative burden is, for those of us who are fundamentally pro-FOIA, not a strong argument.[202] However, it would be ostrich-like to ignore the balancing question: would the administrative burden imposed by repeal of [8] be justified by the extent to which more records would be available?

For me, the answer to that balancing is clearly negative.

Exemption (4) protects confidential commercial or financial information obtained from a person outside the Government, if disclosure would cause substantial competitive harm to the person who submitted the information to the Government.[203] All banks and holding companies supervised by the federal banking agencies are required to submit to examination,[204] so the substantial competitive harm test would apply to information secured from banks and used in exam reports or elsewhere. However, the need to prove substantial competitive harm would produce great uncertainty in the minds of bankers who are expected to be candid and forthcoming in dealing with agency examiners and supervisors. The banker and the official will not know during their exchanges (which are usually largely oral) whether some future agency or Justice Department attorney would be able to prove a likelihood of substantial competitive harm should the information the official is seeking be requested under FOIA. Moreover, portions of the exam reports or other records may be found to be not commercial or financial in character, or particular information may be deemed too stale for protection under the substantial competitive harm test.

---

[202] *But see* Scalia, n. 4 above: FOIA is "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored."

[203] National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test also protects commercial or financial information if disclosure would impair the government's ability to obtain such information in the future. That "impairment prong" of the test is not pertinent here, where the agencies have the power to require disclosure of the information. Landfair v. Dept. of Army, 645 F.Supp. 325, 328 (D.D.C. 1986). However, disclosure might be denied if the agency could show that disclosure might affect the reliability of the data secured by the government, *Washington Post Co. v. HHS*, 690 F.2d 252, 268-9 (D.C.Cir. 1982). For present purposes and for simplicity, I assume that the agencies could make no such showing. However, I expect that there might well be efforts at such a showing.

National Parks also protected information voluntarily submitted to the Government. As to such information, the *National Parks* test was recently modified in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Since bank information submitted in connection with exams is not voluntarily submitted, *Critical Mass* is not applicable.

[204] *See* 12 USC §§ 248(a), 325, 326, 481, 1464(d), 1467(c), 1756, 1820(b), 1844(c), 3102(b) and 3105(c).

Exemption (5) also would protect at least parts of reports of examination and follow-up correspondence. Two problems arise. First, the distinction that often arises under this exemption, whereby "facts" are not exempt but "opinions" are, to protect the official deliberative process.[205] Second, the District of Columbia Circuit recently held that reports of examination benefit from a qualified privilege that is separate and distinct from the deliberative process privilege *(In Re Subpoena Served upon Comptroller of the Currency,* 967 F.2d 630 (D.C. Cir. 1992), *Schreiber v. Society for Savings Corporation,* 11 F.3d 217 (D.C. Cir. 1993)). However, for this qualified privilege also, much is made of the distinction between privileged "opinion" and non- privileged "facts." Making the matter less clear, the D.C. Circuit pointed out in *In Re Subpoena* that the privilege protects (inter alia) communications between examiners and banks, 967 F.2d at 633-634, although those communications are largely factual. Thus the formulation of the privilege in *In re Subpoena* and, more forcefully, in *Schreiber* as not covering facts, leaves open serious questions about both the bank examination privilege and the deliberative process privilege for protecting exam reports under (5).

Of course exam reports are laden with facts gathered by the examiners. However, the agencies contend strongly that the facts marshaled in these reports reflect examiners' judgments as to what is and is not important in evaluating the bank, and whether particular supervisory action is necessary. The agencies contend—consistent with the principles set forth in *Montrose Chemical Corporation v. Train,* 491 F.2d 63 (D.C. Cir. 1974), and more recently in *Mapother v. Department of Justice,* Nos. 92-5261, 92-5262 (September 17, 1993)—that the "facts" marshaled in reports of examination and inspection are exempt under (5) on the basis of both the examination report privilege and the deliberative process privilege. The civil discovery decisions cited above, however, leave open the question whether this view will be accepted by the courts. (There is a far stronger case for ordering disclosure of exam reports in civil discovery situations than in FOIA, as discussed more fully in Section VI-B, dealing with such situations.) The D.C. Circuit has said "it is appropriate for the District Court to consider the possibilities of redaction and a protective order to minimize any harm that might otherwise result from compelling disclosure of bank examination information." 967 F.2d at 634. Of course, protective orders are unavailable under FOIA.

---

[205] For an example of the difficulty of that distinction, see the 7-5 split in Wolfe v. Department of Health and Human Services, 839 F.2d 768 (D.C. Cir. 1988)(en banc).

Would (5) apply to the examiners' own work papers? And would (5)—or (4)—apply to copies of bank records, to notes about exchanges with bank personnel, etc., that become part of the examiners' records? With such documents, the task of item-by-item review looms even larger.

Last, (5) would apply—or certainly be the subject of strong arguments by the agencies—to exchanges between examiners and higher supervisory officials in the course of follow-up to examinations.

Exemption (6) might protect information regarding loans to individuals that are written up and criticized in particular reports of examination.[206] In some situations, redaction might meet the privacy concern, but in many smaller bank situations, identification of the borrower would be possible from such facts as the loan's purpose or size or timing. Thus, redaction is at best an incomplete answer; further, it is bound to involve the burden not merely of redaction itself but of controversy and litigation over whether redaction suffices. X loan—that the regulatory judgment is particularly subject to question. Yet if this judgment is exempted from disclosure, much of the whole effort to use FOIA to increase accountability fails.

Exemption (7) protects information contained in records compiled for law enforcement purposes. Accordingly, (7) would apply if the examination might lead to an enforcement action. "Enforcement" would likely include a significant number, albeit a minor fraction, of all exams and follow-ups, since "enforcement" would include all the written agreements or statements that, under 1989's FIRREA, must be published by the agency, see Section III.A above. As noted in the discussion of FDA inspection reports (Section IV), long delays occur between the time an inspection is written up, if it recommends some enforcement action, and the time the enforcement decision is made; those delays have the result of greatly delaying FOIA-availability.

Even if all records currently covered by [8] were, after [8]'s repeal, still covered by some other exemption, reaching that result would involve record-by-record work diverting official and private resources from more productive FOIA administration, let alone other purposes. Not merely record-by-record review would be necessary: if [8] were repealed and all reliance placed on the other exemptions, we would lose [8]'s clarity, thus simplicity and efficiency. Few who are familiar with exemption (4) will claim clarity for it, and though the other exemptions are not as problematic as (4) they are not remotely as simple as [8].

---

[206] See the episode recounted by Virginia's Commissioner Bailey, §II.D above.

Moreover, whatever the extent of the overlap between [8] and other exemptions, it is fortuitous, whereas [8]'s enactment and its success in flatly repelling amendment efforts by a few Members of Congress, reflect a public policy that goes back over 100 years: the need to preserve the effectiveness of bank examination and related supervisory exchanges between banks and the agencies. Exemption (4) addresses only the commercial interest of the bank or holding company; (5) protects only the agency deliberative processes; (6) protects only parts of the exam reports and follow-up, significant as those parts are; (7) protects only the enforcement process. None of those exemptions protect the strong interest in preserving the unique supervisory process that has been in place so long because they have been deemed necessary in light of this industry's uniqueness.

Coming last to information now covered by [8] but which seems to fall outside the coverage of the other exemptions. As to closed banks, exemption (4) would not apply because no substantial competitive harm to a closed bank could ever be shown. Above in Section VIII.C is a brief statement of why, although the fact that a bank is closed utterly eliminates many of the concerns underlying [8], by no means does it eliminate all.

Another category of information covered by [8] but probably not by other exemptions is information about compliance with such statutes as Truth in Lending and the Community Reinvestment Act. Congress has shown, by recently rejecting the proposal to disclose exam reports on CRA compliance and instead requiring special new reports from exam information, that even when disclosure of exam report information is deemed desirable, making public the exam reports themselves is found undesirable.

We may close with James O'Reilly's point about the unprecedentedly huge, painful reasons for public concern about our financial institutions' soundness. Unquestionably correct, but it does not follow that making exam reports public would reduce the likelihood of future failures or losses or increase agency accountability, as I try to show at many points. Despite our severe suffering from problems in banks and thrifts, disclosure of exam reports is neither solution nor prevention.

XI. Conclusions and Recommendations

1. The gains from public availability of exam reports and similar information are marginal at best. Unlike earlier eras, the soundness and operating performance of depository institutions are the subject of mountains of data made publicly available pursuant to the requirements of regulatory and securities laws. Such data, the product of periodic and routine release, are

detailed and are comparable among peer institutions, thanks to an elaborate mesh of legal requirements and accounting and industry practices. Further, in addition to routine media coverage of the highlights of such data, a number of private firms provide a great variety of compilations and analyses of such data. Thus, 1) interested investors can secure more information than most prudent investors, even institutional ones, can digest; 2) large depositors (who have needs not shared by small, insured depositors) and others who may want fuller information than the media provide can secure analyses tailored for their use ; and 3) persons interested in appraising regulatory performance are well-armed, far better armed than they would be by the defiantly detailed and non-comparable single-bank information they would find in exam reports.

Of course exam reports contain factual information—as well as much else, as noted below—the release of which might in some instances unquestionably add, sometimes importantly, to the publicly available information. I have no doubt there are such instances. However, given the elaborate, sophisticated, constantly and widely monitored flow of financial data about banks, it is hard to believe that there will be many such instances, let alone many in which the newly available information would matter. Therefore, the possibility or even probability of FOIA-availability adding value, requires assuming that (a) sufficiently significant information will be released (b) sufficiently frequently, so as to outweigh (c) the significance and the frequency of the harms—more fully noted below—inescapable in a regime of routine availability. I see no basis for those assumptions, and thus no need for any balancing.

2. As for the gains that public availability of exam reports might bring by rendering examiners and supervisors more accountable. The case for more accountability is obvious, the question is whether this step would help. I believe it would not, for four reasons.

First, if exam reports were publicly available, they would be written differently.[207] One cannot help being skeptical about whether the public would learn anything the bank agencies might prefer to withhold. Instead, the agencies would find new methods to communicate to banks what the agency officials believed the banks had to be told although it would be counterproductive to place the communication in the public domain. Thus, key information would remain beyond public reach—rightly, I believe—but bank supervision would be less efficient.

Second, to the extent that public awareness of bank-specific information helps hold regulators accountable for sound treatment of particular banks, surely the thoroughness and volume of the bank-specific information that is already publicly available, enhances accountability. *Could* any more than marginal enhancement be added by FOIA-availability of exam reports?

---

[207] In an ACUS Rulemaking Committee meeting, a committee member who is a high official of an agency whose inspection reports are FOIA-available, said the reports had become more "genteel." *See above*, n. 114.

Third, even if exam reports were not written at all differently after they were made publicly available, one must ask, "accountable for what?" Exam reports cannot reveal what regulators entirely miss, but only what they find. If the concern is that regulators fail to realize the significance of what they find, will the FOIA requesters be people who are likelier to understand the findings, and will the new public airing be timely enough to be useful? If the concern is that regulators realize the significance of what they find but fail to urge appropriate corrective steps or fail to act forcefully enough to assure corrective action, then the question of timeliness of the FOIA-requester's intervention is acute, even assuming that the regulatory failure is so clear that it would not withstand public disclosure. If the concern is that the general public should be able to get full information about a bank that failed or needed financial assistance, we come to the issue about availability of reports on failed, closed or aided banks. That issue is treated separately below, Conclusion 7.

Fourth, exam information is bank-specific. Much of the goal of accountability (perhaps even most) aims at the adequacy of the regulators' overall approach, systems and methods of implementation, and regulations and policies. How much more public awareness of such matters would flow from releasing exam reports? The author believes there would be more gain in accountability if the public gave more attention to—focusing only on examinations—such matters as these: what do examiners examine for; how often and with what personnel; what are the examiners' training, compensation and turnover; etc. For example, at risk of going beyond the author's mission in this report, an annual report from each agency detailing the facts on such questions, would enhance accountability with respect to examinations.

In short, FOIA-availability of exam reports will do little if anything to increase accountability, and there are other, far better, ways to increase it.

3. Any bank about which examination information is released faces several risks:

(a) The most familiar concern is "a run on the bank" by ordinary depositors. Although that fear is probably exaggerated, the fact remains that it is a real fear in the minds of the supervisors who produce exam reports, many bankers, and perhaps many depositors. Given the reality of that fear, given also the possibility that there might be an occasional run, and given the further possibility that a run precipitated by other events might be wrongly attributed to the release of exam information in an effort to deflect from the actual causes, the obvious question is whether these concerns are outweighed by the gains from disclosure. I believe they are not.

(b) No attention has been given to the modern versions of that familiar concern. Usually, the concern takes the form, consciously or not, of imagining ordinary depositors lined up for withdrawals. Vastly different from that picture is today's reality. Aside from the depositors' view of a bank, its reputation is crucially important for its access to credit from other banks in the federal funds market. And for large banks, especially money-center and multinational banks, reputation even in remote foreign markets is crucially important. Such banks compete for large depositors, and deal with enormous number of wire transfers of enormous sums, much deposited only overnight, and with international capital flows—constant, instantaneous and often volatile. Huge proportions of those depositors instantly move deposits if a shadow of riskiness arises about a bank. Whatever one's view of old-fashioned local bank runs, there is an obvious and substantial cost to rendering large banks vulnerable to the surprises that might arise from FOIA-released exam reports.

(c) Bank examiners are more likely to raise questions about the unusual or innovative, than about the standard and familiar. That applies to both the kinds of transactions, and the kinds of management and systems, a bank may undertake. Whatever one's view of how much bankers innovate, any step that may inhibit innovativeness has a strike against it.

(d) A special risk inheres in FOIA-availability for exam reports, as distinct from other forms of disclosure of bank information. If public disclosure is mandated for all (or appropriate categories of) banks, then all data released are routine and uniform, therefore comparable. Consider the contrasts with releases under FOIA:

(1) There are bound to be differences among exam reports—not merely because of differences among regions and among examiners, but also precisely because exams of different banks, especially at different times, concentrate on different matters.

(2) The very *raison d'être* of exams is to focus on problems, obviously setting up a distortedly negative view for anyone unfamiliar with exam reports.

(3) Since banks are mightily affected by external economic facts of life, unroutinized, selective disclosure might in certain periods give a picture of weakness that in fact is not the fault of the particular bank, but rather shows that the bank has been doing its job: lending at what are normally prudent levels of risk.

(4) We cannot ignore the possibility that FOIA requesters of bank exam reports might include a few irresponsible journalists seeking sensation, and even worse, competitors or other persons seeking negative publicity about a bank for personal or financial gain or vindictiveness. The author, a true believer in FOIA,

can think of no other general area that presents so much reason for skepticism about the possible motivations for FOIA requests.

(e) It is not only the bank whose exam report is released that is at risk from such a release: banks are uniquely inter-dependent. See Section IV, contrasting banks and FDA-regulated firms.

4. For individuals and firms, privacy interests are at stake. Exam reports are not limited to financial information about the bank. Banks customarily have, and exam reports may give, detailed information about directors, officers, and managerial personnel; borrowers; and large depositors. The importance Congress has attached to privacy for bank customers is clear from the Right to Financial Privacy Act of 1978.

(a) Bank personnel have the obvious personal privacy interest in any revelation of financial information about them. In addition, examiners' standard operating procedure includes evaluating and commenting on the performance of bank personnel, from the board level down. Again, the personal privacy interest seems obvious.

(b) For prudent lending, banks need information about borrowers' finances and, often, character, reputation, etc. Such information is kept current; it is often more up-to-date than what may be publicly known about the particular borrower.

Exam reports often give considerable attention to particular loans. Of course it would be possible to redact names before furnishing an exam report to a FOIA requester. Other identifying information could also be redacted, but there are two problems: (i) Often a loan's very size, timing, terms or kind (e.g., construction loans or inventory loans) identify the borrower, especially if the bank-borrower relationship is known (as it very often is in the case of borrowers that are publicly held corporations), or if the bank operates in a small community or with a particular category of borrowers; and (ii) it follows from (i), that the redacting will involve burden and possible controversy.

It is not only the interests of borrowers that must be considered, since many borrowers secure loans from more than one bank. If an exam report on Bank A comments negatively on a loan outstanding to Borrower X, that has implications for every other bank (and there may be many) participating in the same loan.[208]

---

[208] This is not a minor or infrequent problem. The Federal Reserve staff comments explaining their opposition to Senator Wirth's proposal to require disclosure of exam reports on closed banks (see §III.C. above), included this:

> ...In most [exams], lengthy write-ups are included...; and the details of particular extensions of credit are fully set forth, including collateral positions, financial statements, and the prospects for collection.
>
> In [this hypothetical], the examiner determines that a fully performing loan to a company, which is 30% owned by a bank director, shows some signs of deterioration, as well as documentation deficiencies, such as an outdated appraisal. The examiner

5. What of procedural protection for the borrowers, or bank personnel, or whoever might be the subject of negative comments in an exam report? That is, "reverse-FOIA" problems enter. Consider that (a) examiners have unlimited access to bank records, (b) the whole purpose of the examination is to produce candid evaluations, (c) many of the examiners' judgments are far from objective and (d) all of the examiners' comments are subject to response from the bank—let alone possible rebuttal by, say, a borrower. Given all that, if exam reports were simply available to FOIA requesters, we would encounter "reverse-FOIA" problems far more acute than all previous such problems.

6. The importance of preserving undiminished the cooperation and candor between bank personnel and examiners has been stressed since the first court decisions on [8], and as recently as 1992.[209] Of course banks are required to submit to examination, and to respond fully. No less of course, there is a spectrum of degrees and shades of cooperation and candor. For examination efficiency, let alone its effectiveness, anyone advocating any step that might cool or cloud the working relationship bears a great burden of persuasion.

7. What of exam reports on closed banks? (Section VIII.C.) Whether in such cases there is less justification for preserving exam confidentiality was hotly controverted in the Senate in 1991 and 1992. The failure to pass an amendment seems sound, given (a) the chilling effect on the interplay between examiners and troubled banks that might occur if exam information were FOIA-available; and (b) the possible difficulties created for agency efforts to sell such banks' loans or the banks themselves. Disclosure of such reports was the goal of Senator Wirth's 1991-2 bills, see Section III.C.

Further, since 1991, substantial information on insured banks that failed is made public pursuant to FDICIA's requiring a special report by the primary agency's IG, see Section IX.

(..continued)

> adversely classifies the loan as "Substandard," which is the least severe adverse loan classification, due to the slight potential for a loss associated with the loan.
>
> The director's company operates nationwide and borrows from several others banks.... These loans are also performing satisfactorily.
>
> The bank fails two years after the examiner classifies the bank's loan to its insider's related [company]. There is no relationship between the bank's failure and the insider's loan.
>
> ...Unfortunately, there is no nationwide database available...against which [to] check the status of all loans to the director's company. [Thus, w]ithout an intense, on-site scrutiny of every borrower whose loans may be included in a publicly released report...we simply cannot determine the effect of the public release on any open insured [bank]....

Memorandum of March 13, 1992 (in author's files).

[209] *See* the D.C. Circuit's *Fleet Financial*, n. 15, at 633-4. This is not a FOIA case but one involving discovery in the course of private litigation; the pertinence of such cases is stated at §V.B.

8. Is [8] superfluous, or unjustifiable special treatment, given the availability of exemption [4]? As discussed in Section X:

(a) Exemptions (4), (5), (6) and (7) cover much but not all information that [8] covers.

(b) [8] is categorical, whereas those other exemptions will require record-by-record review. Also, [8] is clear and both bankers and officials are familiar with it, whereas the most pertinent other exemption, (4) is less clear, to say the least. As for the view that banks should not be more protected from disclosure than other private commercial firms, this proposition has powerful initial appeal, even more so after the disastrous problems and costs suffered because of unsound thrifts and banks.

Indeed, even without that disaster, the mere fact of federal deposit insurance and likelihood of ultimate taxpayer support establish the enormous public interest in banks' soundness.

However, the question is not whether there is a special, acute public interest in bank soundness...which is undeniable. The question is whether the public interest is served by making exam reports more publicly available.

Other private firms are not subjected to any regulatory supervision remotely like the bank examination process. As long as there is reason to continue this unique regulatory regime, there is also reason to protect the regime's efficiency and effectiveness from random disclosure of whatever happens to be in an exam report whenever some member of the public happens to call for its disclosure. That is, if the public interest in banks warrants fuller public disclosure, as it well may—indeed, as Congress has repeatedly determined, going by the new statutes and practice since 1964—the way to proceed is not by making exam reports FOIA-available, but by requiring focused disclosure either of existing data, or of special, new reports from exam information, such as now required by the 1989 amendment to CRA for performance regarding community investment.

9. What of information about compliance with laws that do not go to the banks' safety and soundness, like Truth in Lending? Congress showed in 1977 when it rejected a change regarding Truth in Lending compliance, and in 1989 when it adopted a superior method to secure disclosure regarding Community Reinvestment Act compliance, that amending [8] is not an effective answer if more disclosure is desired on such matters.

An additional reason for not disclosing exam reports on compliance with such statutes is clear from a 1977 House Report and from the author's interviews with private counsel familiar with exam reports. As noted (Section III.C), in 1977 a House Government Operations subcommittee concerned about enhancing compliance with Truth in Lending, decided that disclosing exam report information "should be studied further." The subcommittee noted "there appears to be a lack of congressional guidance as to what distinguishes 'substantive' and 'technical' violations."[210]

When private counsel were asked about this issue, the uniform response was that examiners are not expert enough in these statutes' complexities to avoid errors, and given the mission of exams, they err on the side of citing violations. Some of the private counsel argued that half to two-thirds of the violations of such statutes that are cited in exam reports err.

Given the 1977 conclusion of the House subcommittee, combined with these current opinions, the CRA method seems unarguably superior, for any additional exam information to be disclosed.

Last: Assuming that [8] is not amended, three potentially fruitful steps are worth considering for agency action:

(a) Recognize [8]'s special status and avoid broad applications of it (and see (c) below).

(b) Experiment with non-FOIA disclosure to make available information covered by [8], either by special reports as is required by the 1989 CRA amendment, or for exam-related internal information that is aggregated.

(c) The banking agencies have started (since work began on this Report) a quarterly meeting of their FOIA officials. Surely that is a commendable step toward not only efficiency, but also increasing the likelihood that policies for implementing FOIA, and perhaps even some specific matters, will have newly-enhanced care.

---

[210] House Report. 95-280, n. 101 above, at 27-8.

Appendices[†]

Appendix 3: Data on FOIA Requests

Data on FOIA Requests to FDIC, FRB, OCC, OTC*

Totals for 4 Agencies	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	30,434	1303 (4.3%)	455 (34.9%)	156 (34.3%)	59 (28.0%)
1991	25,129	1230 (4.9%)	407 (33.1%)	125 (31.0%)	45 (36.0%)
1990**	9,012	846 (9.4%)	318 (37.6%)	84 (26.4%)	32 (38.1%)
1989**	7,433	717 (9.6%)	248 (35.0%)	58 (23.4%)	36 (62.1%)
1988**	6,878	818 (11.9%)	235 (29.0%)	61 (26.0%)	21 (34.4%)

* Source: Annual FOIA Reports of FDIC, FRB, OCC, OTC.
** OTS data not available.

FDIC--Data on FOIA Requests Involving Exemption (8)*

	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	2,046	534 (26.1%)	138 (25.8%)	76	17
1991	1,861	447 (24.0%)	129 (28.9%)	62	13
1990	1,364	369 (27.1%)	166 (45.0%)	44	13
1989	993	219 (22.1%)	133 (60.7%)	24	15
1988	841	244 (29.0%)	122 (50.0%)	23	9

* Source: Annual Reports.

[†] Appendices 1, 2, and 4-6 were omitted from this edition. For complete text of these appendices, see Roy A. Schotland, *Re-examining the Freedom of Information Act's Exemption 8: Does It Give an Unduly "Full Service" Exemption for Bank Examination Reports and Related Material?*, 9 ADMIN. L.J. AM. U. 43, 150 (1995).

FRB--Data on FOIA Requests Involving Exemption (8) *

	Total Requests Received	Total Denials	Denials basedon (8)	Appeals	Denials on Appeal
1992	5,666	346 (6.1%	31 (9.0%)	22	5
1991	5,174	368 (7.1%)	34 (9.2%)	13	2
1990	4,616	294 (6.4%)	28 (9.5%)	15	5
1989	4,306	383 (8.9%)	30 (7.8%)	16	8
1988	4,231	389 (9.2%)	16 (4.1%)	16	0

* Source: Annual FOIA Reports.

OCC--Data on FOIA Requests Involving Exemption (8) *

	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	3,142	189 (6%)	118 (62.4%)	23	17
1991	2,902	166 (5.7%)	99 (59.6%)	15	11
1990	3,032	183 (6.0%)	124 (67.8%)	25	14
1989	2,134	115 (5.4%)	85 (73.9%)	18	13
1988	1,806	185 (10.2%)	97 (52.4%)	22	12

* Source: Annual FOIA Reports.

OTS--Data on FOIA Requests Involving Exemption (8)*

	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on appeal
1992	19,580	234 (1.2%)	168 (71.8%)	36	20
1991	15,292	249 (1.0%)	145 (58.2%)	35	19

* Source: Annual FOIA Reports. OTS data not available 1988-1990.

Report for Recommendation 95-2

Debarment and Suspension Revisited: Fewer Eggs in the Basket

Brian D. Shannon
Professor of Law
Texas Tech University

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

EXECUTIVE SUMMARY 309
I. INTRODUCTION 315
II. EARLIER ACUS ACTIVITY 317
III. CURRENT PROCEDURES 321
  A. Procurement 321
  B. Nonprocurement (Grantee) 324
  C. Key Differences Between the Two Sets of Regulations 329
IV. IMPACT OF KEY COURT DECISIONS ON PROCEDURES 335
  A. Due Process 336
  B. Exhaustion of Administrative Remedies 348
V. DEGREES OF FORMALITY 351
VI. VARIATIONS ON UNIFORMITY 357
VII. PERIOD OF DEBARMENT 362
VIII. MITIGATING FACTORS 366
IX. STATUTORY DEBARMENTS 373
  A. Early Examples 373
  B. More Recent Enactments 375
  C. Punishment or Protection? 377
X. CONCLUSION 379
APPENDICES 381

Executive Summary

Debarment and suspension are remedies that the government may pursue to preclude businesses and individuals from obtaining new government contracts, grants, loans, or other benefits for either a stated or temporary period. These remedies can be either administrative or statutory in nature. A debarment or suspension can have a significant impact on a business that depends on its ability to compete for government work. Indeed, contractors and grantees may fear a debarment or suspension far more than criminal or civil sanctions because of the impact of such remedies on their operations. On the other hand, the federal government has a strong interest in excluding entities that are untrustworthy, dishonest, or otherwise lacking in business integrity from federal programs. Because of the tension between the government's interest in protecting itself from nonresponsible concerns and private entities' interests in avoiding exclusion from governmental programs, the debarment and suspension process has engendered much litigation, procedural experimentation, and policy debate.

The Administrative Conference of the United States has considered the topic of debarment and suspension from federal programs on previous occasions. The 1961-62 Temporary Administrative Conference issued a series of important recommendations regarding the procedures involved in the debarment and suspension of federal contractors. An additional study in 1975 found those earlier recommendations to be sound. Since that time, there has been substantial activity in the debarment and suspension area in the procurement arena, and additional regulatory programs have been promulgated to authorize such actions in nonprocurement programs as well. Moreover, Congress has directed the use of debarment and suspension in a variety of additional contexts.

The current study has focused on the regulatory programs involving procurement debarment and suspension as governed by subpart 9.4 of the Federal Acquisition Regulation (FAR) and a comparable (but not identical) effort involving debarment and suspension in nonprocurement programs coordinated by the Office of Management and Budget (known as the "Common Rule"). These two administrative debarment and suspension processes have similar structures, but are not identical nor completely complementary. The report also addresses a variety of statutes in which Congress has prescribed debarment or exclusion from specific federal programs or for particular improprieties.

A debarment is an action to preclude an individual or entity from receiving future contracts or other government benefits for a designated period of time. A suspension is a similar action on a temporary basis pending completion of an investigation or criminal proceedings. These actions are intended to protect the interests of the federal government to assure that the government "does business," in both its contracting and nonprocurement programs, only with persons and entities that are "presently responsible."

By way of illustration, the debarment and suspension regulations set forth in the FAR generally permit an agency to bar, at least on a temporary basis, a contractor from receiving new contract awards throughout the federal government. Specifically, a federal agency may suspend a contractor based on an indictment or other adequate evidence of a variety of charges relating to a lack of contractor integrity. An agency is not to issue a suspension unless immediate action is necessary to protect the interests of the government. A suspension has immediate effect; accordingly, it will generally impact a contractor prior to an opportunity for a hearing. Specific reasons for suspension are varied but may include an indictment or other adequate evidence of fraud or other criminal offenses in connection with public contracts, antitrust violations, offenses such as embezzlement, theft, bribery, false statements, or other bases reflecting a lack of business integrity or business honesty, and "for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." A suspension is intended to disqualify a contractor temporarily from public contracting and certain government subcontracting pending the completion of an investigation or further legal proceedings. The suspension definitions and procedures are generally similar under the Common Rule for nonprocurement programs.

A debarment is an exclusion for a reasonable, stated period, generally not to exceed three years. An agency may impose a debarment under the FAR or Common Rule on roughly similar grounds to those set forth for a suspension, although a debarment requires a higher "preponderance of evidence" standard. Alternatively, a conviction or civil judgment on charges similar to those delineated for imposing suspension will provide a sufficient evidentiary basis for a debarment. Other causes for debarment include willful failure to perform in accordance with the terms of one or more contracts (or other federal transactions) or a history of failure to perform or unsatisfactory performance on contracts (or other federal transactions). The vast majority of debarments issued by most agencies follow on the heels of convictions. In the absence of a conviction (or civil judgment), however, an agency may pursue a debarment when it possesses its own evidentiary basis for action (even though the Department of Justice may not have pursued or completed any criminal or civil proceedings).

The procurement regulations provide that, like for a suspension, an agency's issuance of a notice of proposed debarment has the immediate effect of barring the contractor from receiving new contract awards from any federal agency. A proposed debarment is different under the Common Rule for nonprocurement programs in that it does not have immediate preclusive effect (although those regulations authorize an agency to issue a suspension and a notice of proposed debarment simultaneously). Thereafter, the general hearing requirements are similar under both sets of regulations; however, they vary depending on whether a suspension or proposed debarment is involved, and whether the case is based on an indictment or conviction or some other evidence.

With respect to a proposed debarment, the contractor or grantee has the right to submit, in person, in writing, or through counsel, information and argument in opposition to the proposed debarment within thirty days following receipt of the notice. This opportunity to submit information and argument in opposition to the proposed action is consistent with the "opportunity to explain and to demonstrate present responsibility as a contractor" that was first discussed at the time of the 1961-62 Temporary Conference recommendations. If the action is not premised on a conviction or civil judgment, the contractor or grantee is entitled to an additional fact-finding hearing *if* its initial presentation raises a genuine dispute concerning the facts giving rise to the proposed debarment. In cases involving a conviction or civil judgment, however, the regulations do not require any hearing beyond the initial presentation of information in opposition to the proposed action. On the other hand, the regulations caution that the existence of a cause for debarment (such as a conviction) does not necessarily *require* that the contractor or grantee be debarred. Instead, the agency is to take into account the seriousness of the contractor's acts or omissions and any pertinent remedial measures or mitigating factors. The procurement regulations include a list of possible remedial measures or mitigating factors, but the Common Rule does not.

Similarly, with respect to a suspension, the affected contractor or grantee is entitled to submit information and argument in opposition to the suspension (in person, in writing, or both) within thirty days following receipt of the notice. Except in cases in which (1) an indictment serves as the basis for the suspension or (2) the Department of Justice has advised that additional proceedings would jeopardize substantial governmental interests in pending or contemplated criminal or civil proceedings, the regulations require the agency to conduct additional fact-finding proceedings when the contractor's submission in opposition raises questions of material fact.

Neither set of regulations further identifies the presiding agency official(s) for either the initial presentation of information in opposition to the action or for additional fact-finding proceedings, when warranted. In addition, the regulations do not specify who should serve as the debarring/suspending officials, although case law has required the use of high-ranking officials for this purpose.

Because the regulations provide that suspensions (and proposed debarments under the procurement rules) have immediate preclusive effect prior to the opportunity for any form of hearing, affected parties have long had concerns about the procedures. Indeed, the regulations and their application present a unique mix of procedural due process considerations. Because a suspension (or a proposed debarment under the procurement rules) generally only bars the award of future contracts or other federal benefits, the preclusion does not implicate any protected property interests enjoyed by the federal participant. On the other hand, because such an action (1) usually raises questions regarding the affected concern's business integrity, and (2) the precluded party's name is circulated on a list (maintained by the General Services Administration) throughout the federal government, the courts have long held that a protected liberty interest is at stake. Accordingly, the government must afford the affected party with notice and hearing opportunities that are in consonance with those required by constitutional due process.

Even though a suspension may implicate a contractor's (or grantee's) protected liberty interests, the federal courts have repeatedly upheld the current regulatory scheme that allows a suspension to have immediate preclusive effect —provided that the agency makes an opportunity for a hearing available within thirty days following imposition of the action. Indeed, although court decisions in favor of private concerns have resulted in occasional fine-tuning of the pertinent regulations, for the most part the courts have upheld the debarment and suspension process despite repeated due process challenges. The fact of compliance with due process requirements, however, does not necessarily mean that the procedures cannot be improved upon. Even though the debarment and suspension programs comport with due process and appear generally to be functioning quite well, additional changes may still be warranted to make the processes more efficient and fair.

Traditionally, the debarment and suspension process was limited to the procurement arena. The efforts leading to the promulgation of the Common Rule for nonprocurement debarment and suspension did not commence until directed by Executive Order 12549, issued in 1986. Even after President Reagan's order and the subsequent development of the Common Rule for nonprocurement debarment and suspension, however, a gap still existed. A contractor debarred by an agency pursuant to the FAR could not obtain any new contracts throughout the federal government. Similarly, an entity debarred from nonprocurement activities could not obtain new grants or other benefits throughout the government. The contractor debarred under the FAR, however, remained eligible for nonprocurement grants or awards. Similarly, an entity debarred under the nonprocurement regulations could still be awarded new procurement contracts. Since the adoption of the Common Rule for nonprocurement activities, two different sets of regulations have separately governed procurement and nonprocurement debarments and suspensions, and there has been no reciprocity between the two actions.

In 1989 President Bush promulgated Executive Order 12689 to require agencies to give reciprocal effect to the debarments and suspensions from each of the two systems. The order also directed OMB to assist agencies in resolving differences between the two sets of regulations. Final regulations requiring such reciprocity have never been promulgated. Recently, Congress addressed the issue as part of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355. The new statute includes a provision intended as a means of further directing the federal government to require agencies to provide comity between procurement and nonprocurement debarments and suspensions. It is time for making the appropriate regulatory modifications to assure that debarment or suspension under one system leads to debarment or suspension under both.

The procurement and nonprocurement debarment and suspension programs are based primarily in regulation or executive order. The procurement debarment and suspension process is also based on the contracting agencies' statutory obligation to contract only with "responsible" contractors. Outside of the general administrative debarment and suspension systems, there are also many debarment or exclusion schemes based on statutes involving both procurement and nonprocurement programs. In many of these statutory programs, Congress has restricted agencies' discretion whether to debar, or to determine the appropriate length of a debarment. Certain of these statutes have a long history. For example, the Buy American Act (41 USC §§10a-10d), which was first enacted in 1933, bars violators from receiving certain construction contracts for a three-year period. In recent years, Congress has increasingly opted to require agencies to debar or suspend in particular situations and for specific prescriptive periods. Debarment and suspension are ordinarily not intended to be punitive in nature, but are remedies premised on the desire to protect the interests of the government. Mandatory exclusions, particularly those which are required to have a specific statutory duration, are generally inconsistent with this policy of being non-punitive.

Moreover, a punitive remedy may require more process than a prophylactic measure intended to assure that the government deals only with responsible concerns. As has been demonstrated through the wide-spread use of the flexible, administrative debarment and suspension procedures, the federal government can achieve comparable social and economic goals through discretionary actions rather than operating under a panoply of mandatory, quasi-punitive sanctions.

In sum, the process is generally working well, although there is still room for certain improvement. The report and recommendations of the 1961-62 Temporary Administrative Conference on debarment and suspension pointed out many procedural flaws and shortcomings in the then-existing practices concerning the debarment and suspension of federal contractors. Now, over three decades later, many of the changes recommended at that time have come to pass. Although these changes evolved slowly at times, the general procedural protections afforded to contractors, and now grantees, have increased substantially. This report canvasses the developments since that earlier report. As described more fully in the report, there will always be a certain level of tension between the government's efforts to assure that it deals only with responsible concerns and affected parties' attempts to demonstrate present responsibility despite alleged or actual prior wrongdoing. The procedural protections now in place generally represent a fair and reasonable framework for balancing these competing interests. With the adoption of the specific recommendations of the Administrative Conference's Committee on Adjudication, the process can be further refined and improved to assure continued fairness. Otherwise, major changes are not warranted at this time. Agency officials should, however, keep in mind the significant duties entrusted to them by the debarment and suspension regulations, and should exercise good judgment in the substantial discretion that has been afforded to them.

I. Introduction

> A small business choosing to put nearly all its eggs in one Government contracts basket must be expected to bear some responsibility for the risk that that basket could, as a result of the contractor's misconduct, temporarily or even permanently be snatched away—with the required procedural safeguards here at issue.[1]

The Court of Appeals for the Federal Circuit made this comment in connection with its review of a due process challenge to a company's suspension from obtaining government contracts.[2] Debarment and suspension are remedies that the government may pursue to preclude businesses and individuals from obtaining new government contracts, grants, loans, or other benefits for either a temporary or stated period.[3] These remedies can be either statutory or administrative in nature.[4] A debarment or suspension can significantly impact a business that depends on its ability to compete for government work. Indeed, contractors and grantees may fear a debarment or suspension far more than criminal or civil sanctions because of the impact of such remedies on their operations.[5] On the other hand, the federal government must have the ability to exclude entities that are untrustworthy, dishonest, or otherwise lacking in business integrity—at least for some reasonable period. Because of the tension between the government's interest in protecting itself from nonresponsible concerns and private entities' interests in avoiding exclusion from governmental programs, the debarment and suspension process has engendered much litigation, procedural experimentation, and policy debate. For the most part, the federal government has been able to maintain debarment and suspension as strong remedies to help protect the public fisc, but contractors and other private businesses have made inroads into achieving greater procedural protections against abusive or punitive actions. Nonetheless, the risk of a debarment or suspension remains constant as one aspect of dealing with the federal government. This report will provide an analysis and assessment of the continuing evolution of the procedures attendant to the debarment and suspension process.[6]

---

[1] ATL, Inc. v. United States, 736 F.2d 677, 684 n.31 (Fed. Cir. 1984).

[2] The court offered these remarks as part of its analysis that a suspension involves a protected liberty interest, not a life or property interest, and that, in theory, a suspended contractor may still pursue non-government work. *See id.* For a detailed discussion of these due process issues, see *infra* notes 94-169 and accompanying text.

[3] With respect to government contracts, see Federal Acquisition Regulation (FAR) Subpart 9.4, 48 CFR Subpart 9.4 (1993). These regulations define a "debarment" as the exclusion of "a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period...." *Id.* § 9.403. A "suspension" is an agency action "to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting...." *Id.* Thus, both of these actions cause a contractor to become ineligible to receive new contract awards. An agency may maintain a suspension for up to 18 months (or even longer if criminal proceedings commence during that period). *See id.* §9.407-4(b). Generally, an agency may impose a debarment lasting up to three years (inclusive of any period of suspension if a suspension precedes the debarment). *See id.* §9.406-4(a). An agency may impose a longer debarment (to be commensurate with the seriousness of the cause or causes), *id.*, and may extend the length of debarment for cause. *Id.* §9.406-4(b). *See, e.g.*, Coccia v. Defense Logistics Agency, No. 89-6544, 1992 WL 345106 (E.D. Pa. Nov. 12, 1992) (upholding the reasons given for a fifteen-year debarment following a remand to the agency after having initially ruled that the term was arbitrarily long). With respect to grants and other nonprocurement government benefits, the regulations include similar definitions for debarment and suspension and their duration. *See, e.g.*, 28 CFR Part 67 (1993) (this is a representative version of a common rule for nonprocurement debarment and suspension that a number of agencies adopted at the same time; for further discussion of this common rule, see *infra* notes 49-51 & accompanying text) (future references in this report to provisions of the common rule will generally be to this particular version).

[4] Much of the discussion in this report will focus on procedural issues relating to administrative debarment and suspension; however, I have also addressed statutory debarment and suspension in one segment of the report. *See infra* notes 289-326 and accompanying text.

---

[5] *See* A.B.A. SEC. PUB. CONT. L., DEBARMENT & SUSPENSION COMM., THE PRACTITIONER'S GUIDE TO SUSPENSION & DEBARMENT 5-6 (1994) [hereinafter *ABA PRACTITIONER'S GUIDE*]. The Debarment & Suspension Committee of the American Bar Association's (ABA) Public Contract Law Section prepared this monograph for initial distribution at the ABA's annual meeting in August 1994. This ABA PRACTITIONER'S GUIDE is an excellent compilation of information concerning the debarment and suspension process.

[6] As part of my preparation for preparing this report, I contacted a number of agency officials involved in the debarment and suspension process. I also sent letters to selected members of the private bar involved in a government contracts practice, whether as corporate counsel or within private firms. I obtained a number of written responses and conducted personal interviews with several of those who responded. Although not a formal survey, many of the comments I received were helpful, and I attempted to incorporate some of the remarks and ideas into my analysis.

Specifically, from agency officials I received extended comments from representatives of the Air Force, Army, Navy, General Services Administration (GSA), Environmental Protection Agency (EPA), Department of Energy, and the Department of Housing and Urban Development (HUD). Several of these letters were from agency officials who indicated that their comments were based on their personal viewpoints, and did not necessarily reflect the official positions of their agencies. I have honored their requests not to attribute statements from these letters to them. I also received written comments from another eight attorneys involved in the process either as corporate counsel or with law firms. In addition, I must express appreciation to Richard Bednar, Chair of the Debarment & Suspension Committee of the ABA's Public Contract Law Section, for allowing me to meet with him and members of his committee and for sharing an early draft of the ABA PRACTITIONER'S GUIDE with me. (Mr. Bednar is also a former debarring official for the Army.) I am also grateful to Janet Cook, debarring official for the Air Force, and Alan Heifetz, Chief Administrative Law Judge of HUD, and his colleagues, for taking time to meet with me to discuss issues involving the process.

I also note that several portions of this report are drawn from selected segments of my earlier research in this area, particularly with regard to certain constitutional due process discussions. *See* Brian D. Shannon, *The Government-Wide Debarment and Suspension Regulations After a Decade—A Constitutional Framework—Yet, Some Issues Remain in Transition*, 134 MIL. L. REV. 1 (1991) (reprinted in 21 PUB. CONT. L. J. 370 (1992)). Finally, I wish to thank Tiffani Barnes for her invaluable research assistance.

II. Earlier ACUS Activity

In 1961 and 1962, the temporary Administrative Conference of the United States (Temporary Conference) conducted an impressive study of the then-existing practices and procedures for the debarment and suspension of federal contractors.[7] Then Department of Defense General Counsel Cyrus R. Vance headed the committee of the Temporary Conference that submitted an extensive report on the debarment and suspension process; the report included nine recommendations for action.[8] The Temporary Conference adopted all of the recommendations.[9]

Specifically, the Temporary Conference report expressed concerns about four major problem areas: (1) an absence of procedural safeguards; (2) inadequate rules regarding the grounds and scope of debarment; (3) the length and disparity of periods of debarment; and (4) the combination of prosecutorial and judicial functions in debarment decision-making.[10]

---

[7] An Executive Order established the Temporary Conference in 1961 to conduct studies of various aspects of administrative law, with a December 31, 1962, termination date. *See* Paul H. Gantt & Irving R. M. Panzer, *Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States*, 5 B. C. INDUS. & COM. L. REV. 89, 90-91 (1963) (an article setting forth an analysis of the Temporary Conference's findings and recommendations regarding debarment and suspension).

[8] *Id.* at 90. *See also* John M. Steadman, *"Banned in Boston—and Birmingham and Boise and ...": Due Process in the Debarment and Suspension of Government Contractors*, 27 HASTINGS L.J. 793, 803 (1976). Professor Steadman's article was based upon a report the author prepared for the Administrative Conference of the United States (ACUS). *Id.* at 793 n.*.

[9] *Id.* at 803. In formulating its recommendations, the study committee obtained the views of a number of federal agencies and a special subcommittee of the ABA. *Id.* For a reprint of the full report and recommendations regarding the debarment and suspension procedures, see SENATE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. No. 24, 88th Cong., 1st Sess. 265-95 (1963) [hereinafter *TEMPORARY CONFERENCE REPORT*]. A copy of the nine recommendations is attached as Appendix A to this report. Although the agencies appeared to have mixed views about the proposals, the committee was of the opinion that its recommendations were necessary to afford "fair governmental administration." *Id.* at 281.

[10] *Id.* at 276-80. With respect to the lack of procedural safeguards, the committee identified several problems: a lack of notice, reasons, or evidence for agency suspensions; adversary hearings in debarment cases were rare; agencies would extend other agencies' debarments without notice; widespread use of de facto debarments by contracting officers with no notice of reasons; and a lack of published regulations for implementing debarments authorized by certain statutes. *Id.* at 276-78. Concerning the rules for the grounds and scope of debarments, the committee was critical of the use of vague, generalized criteria for imposing debarments, and an absence of criteria for extending debarments to affiliated businesses or individuals. *Id.* at 278-79. As to the periods of debarment, the committee observed that businesses suspected of criminal conduct had been subject to indefinite suspensions; the regulations did not provide a mechanism for lifting a debarment upon a showing of present responsibility; and the military departments were debarring for five-year periods without regard to the duration of any related criminal convictions. *Id.* at 279-80. Finally, the committee criticized the agencies for not providing a separation of functions between those who proposed debarment and those who made the final debarment decisions. *Id.* at 280.

The Temporary Conference adopted all nine of the committee's recommendations as a response to these perceived problems. The first, and perhaps key recommendation, called for any debarment to be preceded by a notice of proposed debarment and an opportunity for "a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue."[11] In particular, this recommendation contemplated the employment of formal adjudication like that in the Administrative Procedure Act (APA).[12] The recommendation specifically limited the hearing opportunity, however, to cases in which there were disputed factual issues.[13]

Among the other recommendations of note, the Temporary Conference recommended that parties subject to potential debarment be provided with a notice of proposed debarment supported by reasons for the proposed action.[14] The Temporary Conference also indicated that in certain classes of cases the notice of proposed debarment could also provide for a temporary suspension of the affected concern.[15] The Conference also suggested time limits for these suspensions.[16] In addition, the Conference called for the publication of agency procedural rules for debarments to "be uniform to the extent practicable" and "provide for a fair and speedy determination."[17]

---

[11] *Id.* at 267 (Recommendation 29-1(a)). Professor Steadman described this recommendation as being the report's "central and probably most controversial." *See* John M. Steadman, *supra* note 8, at 804.

[12] *See TEMPORARY CONFERENCE REPORT*, *supra* note 9, at 281 (citing §7(c) of the APA, 5 USC § 556(d) (1988)).

[13] The recommending committee observed that the ABA had provided comments suggesting that the report's opportunity for a hearing was not broad enough because it only applied when there were factual disputes. *See TEMPORARY CONFERENCE REPORT*, *supra* note 9, at 283. The ABA suggested that in many cases in which the facts might not be in dispute, other factors could still militate against the need to debar the affected party. *Id.* In those cases, the ABA wanted to be provided "an opportunity to explain and to demonstrate present responsibility as a contractor," although the ABA acknowledged that this was "not an 'adversary hearing' in the sense of an impartial fact-finding." *Id.* The Temporary Conference committee was apparently of the view that any such argument could be made to the debarring official. *Id.* *See also* John M. Steadman, *supra* note 8, at 804 n.40.

[14] *See TEMPORARY CONFERENCE REPORT*, *supra* note 9, at 267 (Recommendations 29-1(a), (c)). Recommendation 29-6 also called for debarment decisions to be in writing complete with findings, conclusions, and reasons. *Id.* at 269 (the Temporary Conference expected these written decisions to be provided to the affected individual or firm).

[15] *See id.* at 267 (Recommendation 29-2(a)) (describing cases involving criminal convictions or civil judgments affecting contractor responsibility "or upon probable cause for belief that an individual or firm has committed fraud or has engaged in other conduct showing a substantial lack of present responsibility").

[16] For cases in which the government indicted the suspended contractor within a year of the notice of proposed action, the recommendation was to allow the suspension to continue through trial and for an additional 120 days. *Id.* at 268 (Recommendation 29-2(b)(1)). If no criminal proceedings were commenced within one year, then the Temporary Conference called for the suspension to terminate unless the Attorney General determined that disclosure of the government's case at a debarment proceeding would harm the ongoing law enforcement action. *Id.* In such a situation, the Temporary Conference recommended that the suspension should remain in place only for an additional six months (or for the duration of trial if the government brought a fraud action within the 18 months from the initial notice). *Id.* For cases not involving likely indictments or civil fraud actions, the Temporary Conference recommended a limit of 90 days for any suspension (which could be extended for up to another 90 days upon a written determination by a high ranking agency official). *Id.* (Recommendation 29-2(b)(2)).

Concerning the perceived problems with the grounds and scope of debarment, the Temporary Conference recommended that the grounds for debarment be explicitly delineated in published regulations "and, to the extent practicable and desirable, be uniform."[18] Specifically, the Temporary Conference indicated that the grounds for debarment should include "fraud incident to obtaining or performing a government contract or subcontract or any other conduct showing a serious and present lack of business integrity or business honesty as a government contractor or subcontractor."[19]

Finally, the Temporary Conference addressed the duration of debarments by recommending that regulations be amended to require, in general, that debarments normally "be for a reasonable, definitely stated period of time, commensurate with the seriousness of the cause therefor, but not to exceed 3 years."[20] Moreover, the Conference recommended that the procedures allow a debarment to be lifted once a contractor could demonstrate present responsibility.[21] Consistent with this theme, the Conference also called upon Congress "to amend the Buy American and Davis-Bacon Acts to remove the absolute debarment penalties" thereby providing agencies with discretion to limit a debarment upon a proper showing.[22]

Over a decade after the Temporary Conference report on debarment and suspension, ACUS commissioned another report on the subject from then Professor John M. Steadman, which he submitted in 1975.[23] After reviewing developments subsequent to the Temporary Conference report, Professor Steadman concluded that the 1962 recommendation to require trial-type hearings in debarment cases involving disputed facts was "still a sound standard."[24] Given the findings in the Steadman report, ACUS made no further recommendations.[25]

---

[17] *Id.* at 269 (Recommendation 29-5).

[18] *Id.* (Recommendation 29-7(a)). In particular, the recommendations included a charge that these regulations include standards and criteria for identifying and extending debarments to affiliates of debarred concerns, imputing fraud or other improper conduct from an individual to a business, and determining the scope of a debarment in terms of applicability to all or part of a business or to all or some of its contracts. *Id.*

[19] *Id.* at 269-70 (Recommendation 29-7(c)). The Temporary Conference recommended that any findings of fraud or misconduct "be based on substantial evidence." *Id.* at 270.

[20] *Id.* (Recommendation 29-8). The Temporary Conference recommended this three-year period except as provided by statute or Executive Order. *Id.* Several branches of the military objected, preferring the five-year period authorized for some causes under then-existing regulations. *See* Paul H. Gantt & Irving R. M. Panzer, *supra* note 7, at 100. The Gantt and Panzer article provides a fascinating recap of the Temporary Conference committee work and recommendations.

[21] *Id.*

[22] *Id.* (Recommendation 29-9).

[23] A later version of the report was published as a law review article. *See* John M. Steadman, *supra* note 8. The article includes a detailed study of the activity in the debarment and suspension field for the period from 1962-75. *See id.* at 805-23.

There have been many developments in the debarment and suspension field since the last ACUS review reflected in the 1975 Steadman report. The process has evolved significantly in light of regulatory, judicial, and statutory actions.[26] The remainder of this report will highlight important aspects of this activity and provide a few pertinent recommendations.

---

[24] *See id.* at 822. He also chronicled the government's reluctance and inertia in carrying out the various recommendations.

[25] Then ACUS Chair Robert A. Anthony commented in a letter to Professor Steadman at the time that his "only disappointment with it [the report] is that it also is quite persuasive in recommending that we not expend further effort on this topic." Letter from Robert A. Anthony, Chairman, ACUS, to John M. Steadman (Sep. 11, 1975) (on file with author).

[26] The law of debarment and suspension has also generated a substantial body of scholarship. Indeed, subsequent to the 1962 Temporary Conference report, a number of scholars and practitioners, including this writer, have commented on various aspects of the debarment and suspension process. In addition to the articles noted in conjunction with the discussion above, see, e.g., John T. Boese, *Suspension and Debarment: A Primer for the 1990s*, 4 ACQUISITION ISSUES (June 1994); Joseph A. Calamari, *The Aftermath of Gonzales and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 N. ENG. L. REV. 1137 (1982); George M. Coburn, *Due Process Issues in Debarment and Suspension*, 42 Fed. Cont. Rep. (BNA) 571 (Oct. 8, 1984); Howard W. Cox, *Due Process Issues in Suspension and Debarment: A Government Perspective*, 43 Fed. Cont. Rep. (BNA) 429 (March 11, 1985); Paul A. D'Aloisio, *Accusations of Criminal Conduct by Government Contractors: The Remedies, Problems and Solutions*, 17 PUB. CONT. L.J. 265 (1987); W. Jay DeVecchio & Devon Engel, *EPA Suspension, Debarment, and Listing: What EPA Contractors Can Learn from the Defense Industry (and Vice Versa)*, 22 PUB. CONT. L.J. 55 (1993); William L. England, *The Fifth Amendment: A Double-Edge Sword for Government Contractors*, 18 PUB. CONT. L.J. 601, 603-14 (1989); Paul L. Friedman, *Debarment and Suspension: The Government's Most Powerful Weapons*, in FRAUD IN GOVERNMENT CONTRACTING 291 (1985); James J. Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests*, 14 PUB. CONT. L.J. 216 (1984); Steven Horowitz, *Looking for Mr. Good Bar: In Search of Standards for Federal Debarment*, 14 PUB. CONT. L.J. 58 (1983); Karl W. Kabeiseman, *Contractor Debarment and Suspension—A Government Perspective*, 19 A.B.A. SEC. PUB. CONTRACT LAW NEWSL. 3 (1984); Gerald P. Norton, *The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require*, 18 PUB. CONT. L.J. 633 (1989); Brian D. Shannon, *supra* note 6; Edwin J. Tomko & Kathy C. Weinberg, *After the Fall: Conviction, Debarment, and Double Jeopardy*, 21 PUB. CONT. L. J. 355 (1992); Robert D. Wallick et. al, *Suspension & Debarment*, in FRAUD IN GOVERNMENT CONTRACTING 157 (1985); Donna M. Duvall, Note, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors*, 36 AM. U.L. REV. 693 (1987); Lisa A. Everhart, Note, *"Graylisting" of Federal Contractors: Transco Security, Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures*, 31 CATH. U. L. REV. 731 (1982). For related issues, see David A. Churchill & Lawrence J. O'Connell, *New International Consequences of Suspension and Debarment*, 7 INTERNATIONAL TAX & BUSINESS LAWYER 239 (1989).

For even earlier analyses of predecessor procedures, see Paul H. Gantt & Irving R. M. Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 GEO. WASH. L. REV. 175 (1957); Note, *The Blacklisted Contractor and the Question of Standing to Sue*, 56 NW. L. REV. 811 (1962).

III. Current Procedures

The ACUS Temporary Conference recommendations and report dealt with issues concerning debarment and suspension of government contractors. That, too, was the focus of the 1975 Steadman report. Indeed, the bulk of the law in this area relates to procurement debarment and suspension. In more recent years, however, the attention has shifted to include nonprocurement debarment and suspension as well. This section will focus on the evolution of the current procedures for both varieties of debarment and suspension activities.

A. Procurement

The current regulations governing the debarment and suspension of federal government contractors are set forth in Subpart 9.4 of the Federal Acquisition Regulation (FAR).[27] These procedures had their genesis as government-wide regulations as of the early 1980's.[28] Subsequent to the efforts of an interagency task force and Congressional hearings, in July 1981 the Senate Subcommittee on Oversight of Government Management recommended that the federal government issue new debarment and suspension regulations to have government-wide effect.[29] The federal government then proceeded to implement those recommendations. Thereafter, through the 1980's and into the 1990's, the federal government has greatly expanded its rate of imposing debarment and suspension against many of the contractors with whom it does business,[30] and such actions are effective throughout the government.[31]

---

[27] 48 CFR Part 9.4 (1993) (a copy is attached as Appendix B to this report).

[28] Because the procedures began to have government-wide effect in the early 1980's, I have chosen to begin the focus of my discussion as of that time. The 1975 Steadman report did an excellent job of identifying studies and revisions of the regulations in the early to mid-1970's, which I will not repeat here. *See* John M. Steadman, *supra* note 8, at 805-14 (discussing a study by the Commission on Government Procurement, a task group study, and the regulatory response to a significant court decision—Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972) (an important case that I address below; *see infra* notes 102-09 & accompanying text)). *See also* ABA PRACTITIONER'S GUIDE, *supra* note 5, at 25-27 (discussing activity during the same period). Additionally, there was very little regulatory activity of any moment in this field in the late 1970's.

[29] *See* SENATE SUBCOMM. ON OVERSIGHT OF GOV'T MGMT. OF THE COMM. OF GOV'T AFFAIRS, 97th Cong., 1st Sess., REFORM OF GOVERNMENT-WIDE DEBARMENT AND SUSPENSION PROCEDURES 18-19 (Comm. Print 1981) [hereinafter *SENATE SUBCOMM. REPORT*]. Intriguingly, the Senate subcommittee sought greater uniformity in the procedures, not unlike the recommendations of the ACUS Temporary Conference some 20 years earlier, but for very different reasons. The Temporary Conference called for greater uniformity primarily based on concern about perceived unfairness to contractors. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 278, 293. In contrast, the Senate subcommittee wanted uniform, government-wide procedures because of concerns that agencies did not engage in "effective and aggressive debarment and suspension" activities. *SENATE SUBCOMM. REPORT*, at 20. The Senate subcommittee displayed little concern for the rights of contractors, but was troubled that agencies were not undertaking debarment or suspension action when the facts warranted and were not honoring the debarments or suspensions of other agencies. *Id.* at 11.

The Office of Federal Procurement Policy (OFPP) undertook the task to develop debarment and suspension regulations with government-wide effect somewhat contemporaneously with the recommendations of the Senate Subcommittee on Oversight of Government Management. Indeed, the OFPP issued a policy letter setting forth proposed government-wide debarment and suspension regulations in the same month that the Senate subcommittee issued its report.[32] Thereafter, in June 1982, the OFPP promulgated an additional policy letter delineating final rules for government-wide debarment and suspension procedures.[33] The OFPP intended that federal agencies initially adopt the rules stated in Policy Letter 82-1 as part of the various agencies' procurement regulations and ultimately include them as Subpart 9.4 of the FAR (upon promulgation of the FAR).[34]

The government did not simply thrust the rules included in Policy Letter 82-1 on the contracting community in a unilateral fashion. Instead, an intergovernmental task force comprised of legal and procurement experts from various federal agencies considered over 600 industry comments to the proposed rules.[35] The OFPP maintained that the proposed Policy Letter 81-3 provided

---

[30] *See, e.g.*, UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO THE CHAIRMAN, HOUSE COMM. ON GOV'T OPERATIONS, PROCUREMENT, SUSPENSION AND DEBARMENT PROCEDURES 3 (Feb. 1987) [hereinafter *GAO BRIEFING REPORT*]; ABA PRACTITIONER'S GUIDE, *supra* note 5, at 6 (reporting that in 1993 all federal agencies suspended or debarred around 6000 entities, with approximately 1200 by the Defense Department alone—up from 57 by that agency in 1975).

[31] The names of those whom the federal government debars or suspends are included in a monthly list published by the GSA entitled, "Parties Excluded from Federal Procurement or Nonprocurement Programs." There is also an electronic version. Contracting officers are required to consult this list after the opening of bids or receipt of proposals and again prior to contract award. *See* FAR 9.405(d); 48 CFR § 9.405(d) (1993). The GSA list also includes parties excluded under the nonprocurement rules discussed *infra*.

[32] The month was July 1981. *See* Proposed OFPP Policy Letter 81-3, 46 Fed. Reg. 37,382 (July 22, 1981) [hereinafter "*Policy Letter 81-3*"]; *SENATE SUBCOMM. REPORT*, *supra* note 29. The OFPP later published amendments to Policy Letter 81-3 in September 1981. *See* 46 Fed. Reg. 45,456 (Sept. 11, 1981).

[33] *See* OFPP Policy Letter 82-1, 47 Fed. Reg. 28,854 (July 1, 1982) [hereinafter Policy Letter 82-1].

[34] *See id.* (initial summary). *Policy Letter 82-1* antedated the implementation of the FAR—the unified government-wide regulation controlling procurement matters that became effective as of April 1, 1984.

[35] *See id.* at 28,854-55. A number of these comments addressed the contemplated procedures. *See id.* at 28,856. Many other comments related to the government-wide application of the rules. *See id.* at 28,855. As an additional impetus for uniformity, Congress enacted legislation that required the military departments to honor the debarments and suspensions issued by other federal agencies. *See* 10 USC § 2393 (1988 & Supp. V 1993). Thus, at the time of the OFPP consideration, Congress had already directed the Department of Defense to honor other agencies' procurement debarments and suspensions, and the Senate subcommittee was also pushing for actions with government-wide effect. Accordingly, the decision

"fundamental due process" for contractors but, as a result of the public comments, the OFPP further refined the procedures.[36]

The OFPP's rules, as incorporated in the FAR, generally permit an agency to bar, at least on a temporary basis, a contractor from receiving new contract awards throughout the federal government prior to any opportunity for a hearing. Specifically, a federal agency may suspend a contractor based on an indictment or other adequate evidence of a variety of charges relating to a lack of contractor integrity.[37] A suspension is an agency action intended to disqualify a contractor temporarily from public contracting and certain government subcontracting pending the completion of an investigation or further legal proceedings. An agency may impose a debarment on roughly similar grounds to those set forth for a suspension,[38] although a debarment requires a higher "preponderance of evidence" standard.[39] A debarment is an exclusion for a reasonable, stated period, generally not to exceed three years. The procurement regulations provide that an agency's issuance of a notice of suspension or proposed debarment has the immediate effect of barring the contractor from receiving new contract awards from any federal agency.[40] Thereafter, the hearing requirements vary depending on whether a suspension or proposed debarment is involved, and whether the case is based on an indictment or conviction or some other evidence.

---

to require all procurement debarments and suspensions to have effect throughout the federal government through new regulations was not a surprising step.

[36] *See* 47 Fed. Reg., at 28,856. The OFPP fashioned these procedures in accordance with language in some of the earlier court decisions that had questioned previous agency debarment and suspension practices. *See infra* notes 94-118 and accompanying text.

[37] *See generally* FAR 9.407, 48 CFR § 9.407(1993). Specific reasons for suspension include an indictment or other adequate evidence of fraud or other criminal offenses in connection with public contracts, antitrust violations, offenses such as embezzlement, theft, bribery, false statements, or other bases reflecting a lack of business integrity or business honesty, and "for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." *Id.* §§9.407-2(a), (b).

[38] *Id.* §9.406-2. Other causes for debarment include willful failure to perform in accordance with the terms of one or more contracts or a history of failure to perform or unsatisfactory performance on contracts. *Id.* §9.406-2(b).

[39] *Id.* Alternatively, a conviction or civil judgment on charges similar to those delineated for imposing suspension will provide a sufficient evidentiary basis for a debarment. *See id.* §9.406-2(a). Many debarments follow on the heels of convictions. In the absence of a conviction (or civil judgment), however, an agency may pursue a debarment when it possesses its own evidentiary basis for action (even though the Department of Justice may not have pursued or completed any criminal or civil proceedings).

[40] *See id.* §9.405. Although suspensions had immediate government-wide effect under the OFPP framework prior to 1989, only final debarments had similar government-wide effect; mere proposals for debarment had the effect only of barring the contractor from receiving new awards in the agency which issued the notice. *See* 54 Fed. Reg. 19,812, 19,814 (May 8, 1989) (codified at FAR 9.405, 48 CFR § 9.405 (1993)). A proposed debarment is different under the nonprocurement rules in that it does not have immediate preclusive effect (although those regulations authorize an agency to issue a suspension and a notice of proposed debarment simultaneously). *See infra* notes 68-70 and accompanying text.

With respect to a proposed debarment, the contractor has the right to submit, in person, in writing, or through counsel, information and argument in opposition to the proposed debarment within thirty days following receipt of the notice.[41] If the action is not premised on a conviction or civil judgment, the contractor is entitled to an additional fact-finding hearing if its initial presentation raises a genuine dispute concerning the facts giving rise to the proposed debarment.[42] Similarly, with respect to a suspension, the contractor is entitled to submit information and argument in opposition to the suspension within thirty days following receipt of the notice.[43] Except in cases in which (1) an indictment serves as the basis for the suspension or (2) the Department of Justice (DOJ) has advised that additional proceedings would jeopardize substantial governmental interests in pending or contemplated criminal or civil proceedings, the regulations require the agency to conduct additional fact-finding proceedings when the contractor's submission in opposition raises questions of material fact.[44] Because the regulations provide that a suspension or proposed debarment come before the opportunity for any form of hearing, contractors have long had concerns about the procedures.

B. Nonprocurement (Grantee)

Prior to the late 1980's, although various agencies had debarment and suspension programs in effect for nonprocurement programs, there was no government-wide regulation like FAR 9.4. In 1986, however, President Reagan issued Executive Order 12,549 to direct the promulgation of debarment and suspension procedures for nonprocurement activities that would have government-wide effect.[45] That executive order provided, in pertinent part:

---

[41] FAR 9.406-3(c)(4), 48 CFR § 9.406-3(c)(4)(1993). This opportunity to submit information and argument in opposition to the proposed action is consistent with the "opportunity to explain and to demonstrate present responsibility as a contractor" that the ABA sought at the time of the Temporary Conference recommendations. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 283; *see also supra* note 13 (discussing same).

[42] FAR 9.406-3(b)(2); 48 CFR § 9.406-3(b)(2) (1993). The regulations do not further identify the presiding agency official(s) for either the initial agency presentation or for any additional fact-finding proceedings. In cases involving a conviction or civil judgment, the regulations do not require any hearing beyond the initial presentation of information in opposition to the proposed action. On the other hand, the regulations caution that the "existence of a cause for debarment [such as a conviction], however, does not necessarily *require* that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment action." *Id.* § 9.406-1(a) (emphasis added).

[43] *Id.* § 9.407-3(c)(5).

[44] *Id.* § 9.407-3(c)(6).

[45] 51 Fed. Reg. 6370 (Feb. 21, 1986).

> [I]n order to curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs, it is hereby ordered that:
>
> **Section 1.** (a) To the extent permitted by law..., Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have government-wide effect.[46]

The executive order also called for federal agencies to "[f]ollow government-wide criteria and government-wide minimum due process procedures when they act to debar or suspend participants in affected programs."[47] Thus, like the FAR's coverage for procurement programs, Executive Order 12,549 directed the use of government-wide procedures with government-wide effect.[48]

In May 1987 the Office of Management and Budget implemented President Reagan's order by issuing a set of "Guidelines for Nonprocurement Debarment and Suspension."[49] One year later twenty-eight agencies, through the leadership of the Office of Management and Budget, jointly issued a final common rule to establish uniform debarment and suspension rules for nonprocurement programs.[50] Several months later another six agencies adopted the common rules.[51] These rules generally mirrored the approach of FAR 9.4, but with some technical differences. A few of the key distinctions will be discussed below.

---

[46] *Id.* The order specifically covered grants, cooperative agreements, contracts of assistance, loans, and loan guarantees, but excluded procurement programs, direct statutory entitlements or mandatory awards, direct awards to foreign governments or public international organizations, benefits to individuals as personal entitlements, or federal employment. *Id.* at §§ 1(b) - (c).

[47] *Id.* § 2(a).

[48] The order stated that agencies shall "[n]ot allow a party to participate in any affected program if any Executive department or agency has debarred, suspended, or otherwise excluded...that party from participation in an affected program." *Id.* § 2(c). Although agency heads could grant exceptions, the President "intend[ed] that exceptions to this policy should be granted only infrequently." *Id.*

[49] 52 Fed. Reg. 20,360-69 (May 29, 1987).

[50] 53 Fed. Reg. 19,160-211 (May 26, 1988).

[51] 54 Fed. Reg. 4722 (Jan. 30, 1989). Although these rules appear in the various agencies' regulations, as a final common rule they are, naturally, quite similar. In future references to the nonprocurement rules, I will provide citations to pertinent sections of one or more representative provisions (not those of all 30-plus agencies). I have also attached a copy of the DOJ's version of the common rule as Appendix C to this Report.

Even after President Reagan's order and the subsequent development of government-wide procedures for nonprocurement debarments and suspensions, however, a gap still existed. A contractor debarred by an agency pursuant to the FAR could not obtain any new contracts throughout the federal government. Similarly, an entity debarred from nonprocurement activities could not obtain new grants or other benefits throughout the government. But, could a contractor debarred under the FAR still be eligible for nonprocurement grants or awards? Could the entity debarred under the nonprocurement regulations be awarded new procurement contracts? Without some additional agency action pursuant to the parallel set of debarment regulations, the answer to both questions was yes. With the adoption of the final common rule for nonprocurement activities, two different sets of regulations separately governed procurement and nonprocurement debarments and suspensions. Additionally, there was no reciprocity between the two actions. A procuring agency did not have to accord comity to a nonprocurement debarment or suspension, and other agencies did not have to honor procurement debarments with respect to issuing grants or other federal benefits.

In 1989 President Bush promulgated Executive Order 12,689 as a means of addressing this problem.[52] That order provided the following:

> [T]o protect the interest of the Federal Government, to deal only with responsible persons, and to insure proper management and integrity in Federal Activities, it is hereby ordered as follows:
>
> * * *
>
> To the extent permitted by law and upon resolution of differences and promulgation of final regulations..., the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have governmentwide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded... that party from participation in a procurement or nonprocurement activity.[53]

The order also directed the Office of Management and Budget to "assist Federal agencies in resolving differences between the provisions contained in" the two sets of regulations.[54]

---

[52] 54 Fed. Reg. 34,131 (Aug. 18, 1989).

[53] *Id.*

[54] *Id.* § 3(a).

Notwithstanding the issuance of this executive order, the federal government has not yet resolved the reciprocity problem. The executive order was flawed in one key respect: it did not have an exact effective date. Instead, the order called for the publication of proposed implementing regulations within six months "of the resolution of differences" between the two sets of provisions.[55] As of this writing, however, the Office of Management and Budget has been unable to resolve the different viewpoints of the agencies. Accordingly, the order's implementation schedule has never commenced.

On June 8, 1994, the United States Senate passed its version of the Federal Acquisition Streamlining Act of 1994.[56] The bill included a provision intended as a means of further directing the federal government to require agencies to provide comity between procurement and nonprocurement debarments and suspensions.[57] This provision called for the issuance of regulations within six months of the effective date of the act to cause the underlying purposes of the earlier executive orders to come to fruition.[58] The House also passed a version of the bill on June 27, 1994, but it did not include this debarment comity section.[59]

---

[55] *Id.* § 3(b). Final regulations were to follow one year later, to be effective after another 30 days. *Id.* § 3(c).

[56] S. 1587, 103d Cong., 2d Sess., 140 CONG. REC. S6708-45 (1994).

[57] *See id.* § 9004, 140 CONG. REC. at S6744. The provision arose from an amendment intended "to provide strengthening of the debarment and suspension laws and make them uniform." 140 CONG. REC. S6590 (daily ed. June 8, 1994) (statement of Sen. Levin). Senator Levin, on behalf of Senator Harkin, also offered another amendment relating to debarment and suspension to require agencies to "resolve or take corrective action on all Office of Inspector General audit report findings within a maximum of six months of their issuance" or within six months after receipt for audit reports by non-government auditors. *See id.* (proposing amendment no. 1760). This latter amendment became part of the final legislation. *See* H.R. REP. NO. 712, 103d Cong., 2d Sess., § 6009, 140 CONG. REC. H8879, H8912 (Aug. 21, 1994).

[58] Sec. 9004, entitled, "Uniform Suspension and Debarment," provides the following key sections:

> (a) Within six months after the date of enactment of this Act, regulations shall be issued providing that provisions for the debarment, suspension, or other exclusion of a participant in a procurement activity under the...[FAR], or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have government-wide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.
>
> (b) The Regulations issued pursuant to subsection (a) shall provide that an agency may grant an exception permitting a debarred, suspended, or otherwise excluded party to participate in procurement activities of that agency to the extent exceptions are authorized under the...[FAR], or to participate in nonprocurement activities of that agency to the extent exceptions are authorized under regulations issued pursuant to Executive Order No. 12549.

The bill also included language setting forth definitions for procurement and nonprocurement activities. *See* S. 1587, § 9004(c), 140 CONG. REC. at S6744.

[59] *See* S. 1587, 103d Cong., 2d Sess., 140 CONG. REC. H5006-84 (1994) (a complete substitute to the Senate version).

A Conference Committee considered differences between the two versions, and on August 21, 1994, issued a compromise measure.[60] The final bill largely embraced the debarment and suspension comity provisions as originally contained in the Senate version of the bill.[61] President Clinton signed the bill into law on October 13, 1994.[62]

One reason for Congressional consideration of this matter as part of the 1994 procurement reform legislation likely relates to media attention over the last year directed at the Department of Agriculture. In late 1993, the New York Times published a lengthy report criticizing the Department of Agriculture for its general lack of debarment activity and lack of interest in recognizing the debarments of procuring agencies.[63] The article suggested that the Agriculture Department was the only federal agency that had steadfastly refused to comply with President Reagan's Executive Order 12,549 regarding nonprocurement debarment and suspension.[64] Even though this media scrutiny may have caused the Agriculture Department to become more aggressive with respect to debarment and suspension, the coverage attracted the interest of Congress.[65] Indeed, Senator Leahy introduced a bill to force the Agriculture Department to comply with Executive Order 12,549.[66] In addition, the media attention may have caused a renewed focus on the lack of reciprocity or comity between procurement and nonprocurement debarments and suspensions.[67] Regardless of the underlying rationale, however, Congress had now demanded reciprocity. Of course, notwithstanding this legislative command to implement, at long last, the comity requirements of Executive Order 12,689, differences still remain between the two sets of regulations. In addition, there are issues yet to be resolved regarding the best way to achieve the required results.

---

[60] *See* H.R. REP. NO. 712, 103d Cong., 2d Sess., § 2455, 140 CONG. REC. H8879, H8901-02 (Aug. 21, 1994). It should be noted that the provisions of the bill relating to debarment and suspension comprise only an insignificant portion of an enactment that provides for sweeping procurement reforms.

[61] The substantive portion of the language in the conference committee report tracked the provisions in the Senate bill; however, the final bill deleted the Senate language requiring the new regulations to be published within six months of enactment. *See id.* § 2455(a). On the other hand, the conference bill's general provision regarding effective dates provides that all proposed regulations covered by the bill are to be published for comment within 210 days from the date of enactment, and are to be made final within 330 days following enactment. *See id.* §§ 10,002(a)-(c).

[62] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 62 Fed. Cont. Rep. (BNA) 365 (Oct. 17, 1994).

[63] *See* Dean Baquet, *Agriculture Companies Still Get Federal Business Despite Abuses*, N.Y. TIMES, Oct. 12, 1993, at A1 (among its charges, the article highlighted alleged agency inaction with respect to dairy contractors that were still participating in the agency's school lunch program, despite fraud convictions and adverse actions by procurement agencies).

[64] *Id.*

[65] *See* Dean Baquet, *Agriculture Department, in Shift, Will Punish Corrupt Contractors*, N.Y. TIMES, Nov. 23, 1993, at A1 (reporting that the Agriculture Department had decided to comply with Executive Order 12,549 "under pressure from Congress").

[66] S. 1623, 103d Cong., 1st Sess. (1993).

[67] An official within the Office of Management and Budget, who asked to remain anonymous, informed me that the intense scrutiny of the practices at the Department of Agriculture had motivated that agency to reach an informal agreement on reciprocity, but a number of other agencies had balked because of the continuing presence of technical differences between the two sets of regulations. Telephone Interview with Anonymous Source, Office of Management and Budget (June 8, 1994).

C. Key Differences Between the Two Sets of Regulations

What are some of the key differences between the two sets of regulations that have caused difficulties in implementing Executive Order 12,689? How might the differences be resolved? Do the differences need to be resolved to achieve the purposes of the executive order and the new legislation? One of those differences relates to the scope and impact of a notice of proposed debarment. In the procurement arena, the federal government has expanded the effects of debarments and suspensions during the last several years. In 1989 the government amended the FAR to require a proposed debarment to have immediate preclusive effect throughout the federal government.[68] Thus, under current regulations, a proposal for debarment under the procurement regulations has the same government-wide effect as a suspension. This approach differs, however, from the rules for nonprocurement debarments.[69] In contrast to the FAR, a proposed debarment under the nonprocurement rules does not have immediate effect unless the agency also suspends the affected party.[70]

Prior to the 1989 amendment to the FAR, a proposed debarment under the procurement rules had the effect only of barring a contractor from receiving contracts within the issuing agency pending a final debarment determination.[71] This change in the regulations corrected an anomaly in the former process. The prior rules somewhat curiously allowed a suspension—which an agency could base merely on an indictment or other adequate evidence of contractor impropriety—to have immediate, government-wide effect, but permitted a proposal for debarment—which ultimately would need to be based on a conviction, civil judgment, or some other significant cause supported by a preponderance of evidence—to have effect only within the issuing agency. "This enable[d] a seriously nonresponsible contractor to continue to receive contract awards from other Federal agencies until a debarment decision [wa]s rendered."[72]

---

[68] *See* 54 Fed. Reg. 19,814 (May 8, 1989) (codified at FAR 9.405(a), 48 CFR § 9.405(a) (1993)).

[69] *See, e.g.*, 28 CFR § 67.200(a) (1993) (DOJ); 24 CFR § 24.200(a) (1993) (HUD).

[70] *See id.*

[71] *See* 52 Fed. Reg. 28,642 (July 31, 1987) (proposing amendments to FAR 9.405(a), 48 CFR § 9.405(a) (1993)). Of course, the old approach is still different from the nonprocurement rules, under which a proposed debarment, standing alone, is simply that—a proposal for possible action.

[72] *Id.* The General Accounting Office recommended this change in 1987. *See* GAO BRIEFING REPORT, *supra* note 30, at 13.

As I have discussed elsewhere,[73] the change in the procurement rules to expand the scope of a proposed debarment should not entitle contractors to any additional process. Given that the courts have generally upheld the suspension procedures from constitutional due process attacks,[74] the debarment procedures, even with a proposed debarment now having government-wide effect, must be valid as well.[75] Indeed, it is an anomaly that the nonprocurement rules have not been changed as well. On the other hand, the nonprocurement rules do allow the issuance of a suspension at the same time as a notice of proposed debarment, which would achieve a similar result as a notice of proposed debarment under the FAR. Should there be consistency between the two sets of regulations on this issue?

In addition, one thing lacking in the current procurement debarment rules is a minimum threshold showing for an agency to initiate a proposed debarment. Given that a suspension, which has government-wide effect, must be based on adequate evidence, a proposal for debarment, which also has government-wide effect under the FAR, should be premised on at least adequate evidence, as well. Because the courts have likened the adequate evidence standard to the probable cause showing necessary to support a search warrant,[76] the regulations should require a similar probable cause showing to initiate a proposed debarment. The issue is not as significant under the nonprocurement rules because of the lack of effect of a proposed debarment under that set of regulations.

---

[73] *See* Brian D. Shannon, *supra* note 6, at 30-31.

[74] *See infra* notes 94-169 & accompanying text.

[75] Consider, for example, the decision in Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984), in which the Federal Circuit rejected due process attacks on a pre-indictment suspension based solely on adequate evidence consisting of two FBI search warrant affidavits. Even though a proposal for debarment under the FAR now has the same practical effect as a suspension (an immediate, government-wide preclusion from obtaining new contract awards), the post-deprivation process is *more* extensive than for a suspension. First, a debarment requires a higher standard of proof (a conviction, a civil judgment, or a preponderance of evidence). *See* FAR 9.406-2, 48 CFR § 9.406-2 (1993). Also, unlike in the case of a suspension, an agency may not limit a contractor's hearing rights in a debarment action based on advice from the Justice Department. *Compare id.* §§ 9.406-3(b)(2), (d)(2) *with id.* §§ 9.407-3(b)(2), (d). Accordingly, if the process afforded for a suspension generally meets constitutional requirements, then clearly the FAR's more extensive process for handling debarments must satisfy minimal due process standards as well.

[76] *See* Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972), in which the court stated,

> The 'adequate evidence' showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to *the probable cause necessary for* an arrest, *a search warrant*, or a preliminary hearing. This is less than must be shown at trial, but it must be more than uncorroborated suspicion or accusation.

(emphasis supplied).

As a practical matter, such a threshold showing for a proposed debarment should not prove to be a great hurdle for the government. Because the ultimate burden of proof for a debarment is a preponderance of evidence, an agency will likely wish to start the usual debarment action with greater evidentiary support than a minimal amount of proof equating to adequate evidence.

In 1989 the government also expanded the scope of procurement debarments and suspensions by creating a prohibition against most subcontracting by either debarred or suspended contractors.[77] Prior rules precluded agencies from consenting to subcontracts with debarred or suspended firms, but these firms could otherwise enter into subcontracts that did not require government approval.[78] The current regulations (1) preclude the government from consenting to any subcontracts with a debarred or suspended contractor—in cases in which government consent is required—in the absence of a compelling reason determination by the agency head or a designee, and (2) preclude prime contractors from entering into subcontracts of $25,000 or more with any debarred or suspended contractor unless that contractor makes a compelling reason determination and so notifies the agency's contracting officer.[79] This amendment to the FAR has essentially excluded almost all subcontracting over the small purchase limitation with contractors who are suspended, debarred, or proposed for debarment—at least at the first tier level. In addition, a prime contractor's retention of a debarred or suspended subcontractor could have a bearing on the prime's overall responsibility.[80]

In contrast to the FAR, the regulations in the nonprocurement arena are even broader. Those regulations require a debarment or suspension to flow down to every tier of participation for most governmental programs.[81] Thus, in most situations, a debarred or suspended firm cannot enter into transactions at any level with another entity that is obtaining government grants or other benefits.

---

[77] *See* 54 Fed. Reg. 19,815 (May 8, 1989) (codified at FAR 9.405-2, 48 CFR § 9.405-2 (1993)).

[78] *See* 52 Fed. Reg. 28,642 (July 31, 1987) (proposing amendments to FAR 9.405-2, 48 CFR § 9.405-2 (1993)).

[79] FAR 9.405-2, 48 CFR § 9.405-2 (1993). Congress has mandated that Defense Department contractors require their subcontractors to notify them at the time of contract award of any subcontracts in amounts greater than the small purchase threshold (currently $25,000) whether they are then debarred, suspended, or otherwise ineligible. *See* 10 USC § 2393(d) (Supp. V 1993). The recent procurement streamlining legislation increases the simplified acquisition threshold to $100,000 and correspondingly amends § 2393(d). *See* H.R. REP. NO. 712, 103d Cong., 2d Sess., § 4102(e), 140 CONG. REC. H8879, H8905 (Aug. 21, 1994).

[80] *See* FAR 9.104-4(a), 48 CFR § 9.104-4(a) (1993) (providing that "[d]eterminations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility"); Medical Devices of Fall River, Inc. v. United States, 19 Cl.Ct. 77, 82-83 (1989) (upholding as reasonable a contracting officer's finding that a contractor, which entered into a subcontract with a debarred contractor for 100% of the contract items, was not a responsible offeror).

[81] *See, e.g.*, 28 CFR § 67.200(a)-(b) (1993) (requiring the exclusion of persons debarred or suspended under the nonprocurement rules from being participants or principals in "primary covered transactions" and all "lower tier covered transactions."). The regulations define a "primary covered transaction" to include such nonprocurement transactions as grants, cooperative agreements, scholarships, fellowships, assistance contracts, loans, loan guarantees, subsidies, and others. *Id.* § 67.110(a)(1)(i). A "lower tier covered transaction" is defined to include "[a]ny transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction." *Id.* § 67.110(a)(1)(ii)(A). This latter term also includes (1) procurement contracts between a

Under Executive Order 12,689 and the recent procurement streamlining legislation, should there be consistency between the procurement and nonprocurement debarment and suspension rules on this issue? If so, can the subcontracting and lower tier transaction rules be reconciled? I argued in another forum that the 1989 FAR amendments represented a seemingly unnecessary expansion of the scope of debarments and suspensions.[82] Arguably, the same can be said for the current nonprocurement rules, although there may be differences of some significance. There is certainly some level of appeal both politically and for appearance purposes in not allowing federal dollars to flow to any debarred, suspended, or excluded firm or individual whether they are attempting to do business directly with the government or in a subcontracting or other lower tier arrangement. In the procurement arena, however, absent some level of privity between the government and the affected person, the barring of lower tier subcontracting appears punitive in nature. Unless the subcontracting at stake is one in which the government requires an approval (some direct contact between the government and the affected concern), the business integrity of any excluded party should be part of the responsibility of the party dealing with the government, not that of the agency itself. In addition, once the government has made a determination that an eligible firm is responsible and worthy of obtaining a government contract, why should there be further concern about that firm's lower tier arrangements? At that point the federal agency has no direct relationship with the "tainted" party, and arguably the government no longer needs the same level of *protection* that it does in situations in which there is privity between the agency and the excluded person or firm.[83] If the "tainted" party plays too big a role in the overall operation of the contract or program, the government should exercise its discretion to decline to enter into the prime contract.

By limiting its primary application to prime contracts and most first-tier subcontracts, at first blush the FAR appears to more closely address situations in

---

participant and a person under a primary covered transaction that are at or above the Federal procurement small purchase threshold, or (2) any other procurement contract, regardless of amount, between a participant and a person under a covered transaction in which that person will have "critical influence on" or "substantive control over" the covered transaction (including principal investigators and providers of federally-required audit services). *Id.* §§ 67.110(a)(1)(ii)(B)-(C).

[82] *See* Brian D. Shannon, *supra* note 6, at 32. I did acknowledge, however, that "given the ongoing public concerns about procurement fraud, the ban on most subcontracting will likely continue…." *But see* GAO BRIEFING REPORT, *supra* note 30, at 13 (recommending an extension of the regulations to include all subcontractors).

[83] Even Congress, in barring individuals convicted of procurement fraud from almost all involvement in defense contracting for at least five years, generally limited that exclusion to prime defense contracts and first tier subcontracts. *See* 10 USC § 2408(a) (Supp. V 1993).

which the government needs protecting than does the nonprocurement approach. Different issues are arguably at stake in the nonprocurement arena, however. There are often differences in the business relationships between the government and private parties depending on whether the government is procuring goods or services or is involved in a grant, loan, or other benefit program. In these nonprocurement grantee situations, often the pertinent government agency may be several levels removed from the actual transactions. Unlike the case for a procurement contract, there may be no direct privity "chain" between the agency and the grantee. Thus, in procurements for goods or services the government often has flexibility to require the approval of certain subcontractors. This may not be the case with regard to lower level grantees under nonprocurement programs. Other policy factors may be at stake with regard to lower tier transactions in the nonprocurement arena as well.[84] Thus, it may be entirely appropriate to continue the current exclusion of debarred and suspended entities from all covered levels of nonprocurement programs. Additionally, given the political wariness about allowing *any* federal dollars to flow into the hands of a barred entity, it is unlikely that easing any restrictions on subcontracting or participating in lower tier transactions will be welcomed. Thus, reconciling the different flow-down approaches in the FAR and nonprocurement rules may prove difficult and might not be desirable.

Because of some of the significant differences between the two sets of regulations, agency officials are currently approaching the problems of implementing the executive order and new legislation in another fashion. Indeed, an Interagency Coordinating Committee for Suspension and Debarment has taken the view that uniformity between the FAR and the nonprocurement debarment rules is neither desirable nor necessary.[85] Rather than attempting to create one set of uniform regulations, this interagency committee, working along with officials from the Office of Management and Budget and others, has recently developed proposed regulations to implement reciprocity.[86] These regulations would simply revise the FAR and the nonprocurement rules to provide that a debarment or suspension under one set of rules should be accorded reciprocal effect in programs governed by the opposing rules.[87] Implementation of these proposed changes should satisfy the mandates of the earlier executive order and the recent procurement streamlining legislation to assure that a concern excluded from doing business with one side of the government's house will be excluded from the other side as well.

---

[84] In response to an earlier draft of this report, several government commentators stressed that in some federal assistance programs "critical health and safety functions are often performed" several tiers removed from the primary transaction. The government and higher tier entities may be in a position to provide only limited oversight in such situations; thus, an expansive scope for any debarment or suspension may be necessary to assure the exclusion of dishonest or untrustworthy persons at these lower levels. Letter from Janet C. Cook, Assistant General Counsel for Contractor Responsibility, Air Force, to Nancy Miller, Staff Liaison, ACUS 2 (Oct. 17, 1994) (on file with ACUS) [hereinafter "Cook Letter"]; Letter from Robert F. Meunier, Director, Suspension and Debarment Division, & David M. Sims, Chief Hearing Officer, Office of Grants and Debarment, EPA, to Nancy Miller, Staff Liaison, ACUS 3 (Oct. 14, 1994) (on file with ACUS).

[85] *Id.* at 2.

[86] *Id.* at 1-2.

Even if greater uniformity does not result from approaching the reciprocity issue along the lines currently under consideration, additional consistency can be achieved. For example, the rules regarding the effect to be given to a proposed debarment need not continue to be different. The addition of a threshold evidentiary showing for a proposed debarment should also not prove to be a substantial roadblock.[88]

With a greater overlap of procurement and nonprocurement debarment and suspension activity, another issue that no doubt will become more problematic relates to which agency should take the lead in pursuing and handling a case in which an entity has multiple governmental contacts. Interagency cooperation should be a major goal in such situations. Indeed, the FAR encourages agencies "to establish methods and procedures for coordinating their debarment or suspension actions."[89] The nonprocurement regulations include this same language.[90] Thus, the basic regulations do not differ here; nonetheless, further implementation is generally lacking. Although formal policies have not evolved, certain agencies do endeavor to cooperate and coordinate activities. For example, within the Department of Defense, two years ago the Under Secretary set forth a policy memorandum addressing interagency coordination.[91] Similarly, that agency has engaged in efforts with the EPA to coordinate procurement debarments when defense contractors violate environmental laws.[92] Additionally, one agency official who responded to my request for comments indicated that periodically debarment officials and staff representatives from interested federal agencies meet on an informal basis to discuss cases of general interest, trends, and other items of mutual interest. These informal efforts are a good start, but appear to fall short of the "encouragement" in both sets of regulations to establish methods and procedures for coordination. Without additional development of coordination policies, problems could result.[93]

---

[87] *See* Cook Letter, *supra* note 84, at 1.

[88] Another key difference in the two sets of regulations relates to the FAR's inclusion of a specific listing of a variety of mitigating factors and remedial measures for the debarring/suspending official to take into account when making determinations. Attention should be given to amending the nonprocurement rules to include such factors and measures. For a full discussion of this topic, see *infra* notes 258-88 & accompanying text.

[89] FAR 9.402(c), 48 CFR § 9.402(c) (1993) (which also provides that when multiple agencies have an interest in a debarment or suspension matter, "consideration shall be given to designating one agency as the lead agency").

[90] *See, e.g.*, 28 CFR § 67.115(c) (1993).

[91] *See* Memorandum from Don Yockey, Under Secretary of Defense, to the Secretaries of the Military Departments et al. (Sep. 28, 1992) (on file with author) [hereinafter "Yockey Memo"]. The Under Secretary did not actually go much beyond the policy already identified in the FAR. On the other hand, he did recognize the potential for concern by observing,

> It is essential that all debarring officials coordinate fully within the Department [of Defense] to determine the possible effects of their actions on other organizations and to receive additional information which may affect their decisions. Although this is intended to be effective primarily within DoD, in certain cases coordination should also be carried out with civilian agencies.

Id.

IV. Impact of Key Court Decisions on Procedures

The government-wide debarment and suspension regulations did not evolve in a regulatory vacuum. Several significant court decisions over the years have greatly impacted the development of today's procedures. This section will discuss the significance of selected key cases.

---

[92] *See* W. Jay DeVecchio & Devon Engel, *supra* note 26, at 75-76.

[93] *See, e.g., id.* at 66 (describing an EPA case in which the agency initiated a debarment action despite decisions by two other agencies not to take action); Facchiano Construction Co., Inc. v. Dep't of Labor, 987 F.2d 206 (3d Cir.), *cert. denied*, 114 S.Ct. 80 (1993) (involving a HUD debarment action premised on the same underlying wrongdoing as in an earlier Department of Labor debarment). In addition, the Chief Administrative Law Judge for HUD has observed that his agency once sought to debar an entity for a year relying on the same facts that the Defense Department had used to debar the same concern for two months. Letter from Alan W. Heifetz, Chief Administrative Law Judge, HUD, to Brian D. Shannon 1 (April 15, 1994) (on file with author). He expressed concern that his agency had not engaged in efforts to coordinate procedures with other agencies. The General Counsel for HUD is of the view, however, that his agency does an adequate job of coordinating activities with other federal agencies. Letter from Nelson A. Díaz, General Counsel, HUD, to Brian D. Shannon 2 (Sep. 29, 1994) (on file with author). He has also disputed Judge Heifetz' assertion that HUD has attempted to debar an entity previously debarred by the Department of Defense. *Id.* (although he acknowledged the issuance of one-year limited denials of participation by the agency's Baltimore office to two companies previously suspended, then debarred by the Army).

The Defense Department has a loose policy in place for determining the lead agency for cases in which a defense contractor deals with more than one military branch or defense agency. *See* Yockey Memo, *supra* note 91, at 2. That memorandum "essentially gives the lead agency assignment to the agency with the predominant financial interest." *Id.* This approach could result in problems in a situation in which a company has traditionally contracted or otherwise dealt principally with one department or agency, but might have a higher dollar amount of contracts or other benefit arrangements with another department or agency in a particular year. Moreover, the wrongdoing giving rise to the action might stem from a contract or grant with still another department or agency. The overlap of procurement and nonprocurement debarments will expand the potential for problems and heighten the need for coordination. One commentary has suggested that entities facing potential debarment or suspension should act "proactively to raise the matter with the agency ... most interested in ... [their] future." W. Jay DeVecchio & Devon Engel, *supra* note 26, at 75.

A. Due Process

Perhaps the most important early case leading to the federal government's eventual development of government-wide debarment and suspension procedures was *Gonzales v. Freeman.*[94] In *Gonzales* the Commodity Credit Corporation first suspended, and then debarred a contractor from doing business with the agency for five years.[95] The contractor asserted that the agency had violated its due process rights. In addressing whether the contractor had a viable due process claim, the D.C. Circuit announced that

> to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such *right;* but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.[96]

A chief concern of the court centered on the lack of agency standards for making debarment determinations. Accordingly, the court held that the agency's lack of regulations and standards had resulted in the imposition of a debarment outside the agency's statutory jurisdiction and authority.[97] The court reasoned that debarment determinations should not "be left to administrative improvisation on a case-by-case basis...but should be] exercised in accordance with accepted basic legal norms."[98] Specifically, the court suggested that basic fairness dictated the establishment of "standards for debarment and procedures... [to] include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based on the record so made."[99] Thus, *Gonzales* served as a strong impetus for federal agencies to develop debarment and suspension procedures.[100] In that regard, the *Gonzales* decision was consistent with the 1962 Temporary

---

[94] 334 F.2d 570 (D.C. Cir. 1964). The future Chief Justice, Warren Burger, authored the opinion in *Gonzales.*

[95] *Id.* at 572. The agency's initial suspension of the contractor stemmed from allegations of possible misuse of official inspection certificates; it was to remain in effect "pending investigation." *Id.*

[96] *Id.* at 574 (emphasis in original). The court further opined that even though the government's debarment authority is inherent as part of its general statutory contracting power, "to the debarment power there attaches an obligation to deal with uniform minimum fairness as to all." *Id.* at 577.

[97] *Id.* at 580.

[98] *Id.* at 578.

[99] *Id.* The court observed, however, that the government could impose temporary suspensions, with procedures to follow, for "a reasonable period pending investigation." *Id.* at 579.

[100] The court also called for any procedures to be both fair and uniform. *Id.* at 580. Of course, some agencies had developed regulations before *Gonzales. See* Joseph A. Calamari, *supra* note 26, at 1145.

Conference recommendations concerning a need for greater procedural protection in the administrative debarment and suspension process.[101]

Eight years following *Gonzales,* the D.C. Circuit addressed the procedural requirements for government suspension actions in *Horne Brothers, Inc. v. Laird.*[102] In *Horne Brothers* the court was extremely critical of the suspension regulations that the Defense Department had in place at that time.[103] Just as described in the 1962 Temporary Conference Report, the regulations allowed suspensions to extend up to eighteen months and more without an opportunity for confrontation.[104] The court announced that it would accept temporary suspensions for short periods, up to one month, without an opportunity for confrontation, but not for longer periods.[105] The court reasoned that the government, upon suspending a contractor, should "insure fundamental fairness" by providing "specific notice as to at least some charges alleged against…[the contractor], and… an opportunity to rebut those charges."[106]

The court in *Horne Brothers* did not stop with its suggestion that the government must offer the suspended contractor some opportunity for confrontation within one month of the suspension. The court also discussed its views of what constitutes "adequate evidence" for purposes of imposing suspension and the circumstances in which an agency should be permitted to limit notice and hearing opportunities for the contractor.[107]

The criteria that the court delineated in *Horne Brothers* eventually became firmly implanted in the government-wide debarment and suspension regulations. For example, FAR 9.407-3(c)(5) now provides that a suspended contractor may submit information in opposition to the suspension within thirty days following receipt of the notice of suspension—a direct incorporation of the one month suggested in *Horne Brothers.*[108] The FAR also now includes a definition of

---

[101] *See supra* notes 10-21 & accompanying text.

[102] 463 F.2d 1268 (D.C. Cir. 1972). In *Horne Brothers* a contractor asserted that the Navy had violated the law by issuing a suspension and then refusing to award a ship repair contract to that contractor some three weeks after the date of suspension. *See id.* at 1269, 1272.

[103] *See id.* at 1269.

[104] *Id.* at 1270.

[105] *Id.* This discussion of the suspension regulations was largely dicta because the Navy's refusal to award the repair contract to the suspended contractor came only three weeks after the issuance of the suspension—well within the one-month window the court believed to be reasonable.

[106] *Id.* at 1271.

[107] *See id.* at 1271-72.

[108] 48 CFR § 9.407-3(c)(5) (1993). Thus, the drafters of the current debarment and suspension regulations borrowed liberally from the court's "suggestions." Indeed, many agencies quickly modified their regulations after the *Horne Brothers* decision. *See* Joseph A. Calamari, *supra* note 26, at 1151; *See* John M. Steadman, *supra* note 8, at 807-08.

"adequate evidence" which requires a rather minimal showing not unlike that discussed in *Horne Brothers.*[109]

Another case that impacted the development of the present debarment and suspension regulations was *Transco Security, Inc. v. Freeman.*[110] The *Transco* case is important with regard to both procedural and notice requirements.[111] Concerning the challenge to the procedures, the contractor in *Transco* attacked the suspension regulations that the GSA had adopted subsequent to the D.C. Circuit's decision in *Horne Brothers.*[112] The case arose after *Mathews v. Eldridge*[113] and involved the court's application of the *Mathews* balancing test to the agency process GSA afforded in the company's challenge to the agency suspension. Specifically, the court weighed the contractor's liberty interest in avoiding being improperly denied the opportunity to seek government contracts against dual governmental interests of getting its contracting "money's worth" and protecting an ongoing criminal investigation.[114] The court denied the challenge to the regulations reasoning that the suspended contractor, even in the absence of a more detailed hearing on the facts, still had an opportunity to submit information and argument in opposition to the suspension—some chance at confrontation.[115] Thus, the *Transco* decision provided the federal government with a judicial imprimatur for retaining and further developing regulations providing for only limited, post-deprivation process in suspension cases.

---

[109] *Compare* FAR 9.403, 48 CFR § 9.403 (1993) (defining "adequate evidence" as "information sufficient to support the reasonable belief that a particular act or omission has occurred") *with* Horne Brothers, 463 F.2d at 1271, in which the court stated,

> The 'adequate evidence' showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at trial, but it must be more than uncorroborated suspicion or accusation.

[110] 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981). *Transco* involved a challenge to a GSA suspension of a security guard company. *Id.* at 319.

[111] In *Transco*, a suspended contractor challenged both the agency's suspension regulations and the agency's notice of reasons for the suspension. *Id.* at 320.

[112] *Id.* at 321. The regulations permitted the agency to deny a hearing to the contractor upon advice from the DOJ that a hearing would adversely affect a criminal prosecution. *Id.* at 319 (citing 41 CFR § 1-1.605-4(e) (1975)). In such a situation, in lieu of a more extensive fact-finding hearing, the contractor could merely present information and argument in opposition to the suspension. 639 F.2d at 321-22. This aspect of the regulations stemmed directly from the 1962 Temporary Conference recommendations concerning suspension procedures. The Temporary Conference had taken the position that DOJ should be able to advise against the holding of a fact-finding hearing (for up to 18 months) in the event that the agency hearing might prejudice an ongoing prosecution. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 268, 289 (Recommendation 29-2(b)(1) and related discussion).

[113] 424 U.S. 319 (1976). For a discussion of *Mathews*, see *infra* notes 123-27 & accompanying text.

[114] *Id.* at 322.

[115] *Id.* The court also determined that although only a high agency official should determine whether there exists adequate evidence for a suspension, the GSA had met such a standard because the decisionmaker had been the head of the agency. *Id.* at 324.

Despite upholding the procedural aspects of the regulations as challenged in *Transco*, the court nonetheless determined that the agency had provided the contractor with a constitutionally inadequate notice.[116] The court reasoned that due process mandates a "notice sufficiently specific to enable… [the contractor] to marshal evidence in…[its] behalf so as to make" any confrontation opportunity "meaningful."[117] Some years later, the Federal Circuit described these notice requirements in a much more colorful fashion by declaring that the agency's notice must be sufficiently specific to enable the contractor "to get its 'ducks in a row' in preparation for a meaningful response in the next step of the administrative suspension process."[118]

One of the linchpins of the 1962 ACUS Temporary Conference recommendations was a focus on requiring formal, trial-like hearings as part of the debarment and suspension process.[119] Professor Steadman echoed this call for more process in his 1974 study of the procedures.[120] As a matter of constitutional due process, these positions were certainly consistent with the approach of the Supreme Court in *Goldberg v. Kelly*.[121] The perception that due process imposes requirements for agencies to make debarment and suspension determinations only after full, trial-like hearings changed, however, as a result of the Supreme Court's 1976 decision in *Mathews v. Eldridge.*[122] Although not a debarment or suspension case, *Mathews* has had a significant impact in shaping subsequent debarment and suspension law.

---

[116] *Id.* at 323-24. The GSA had couched the notice of contractor wrongdoing in vague and general terms such as "billing irregularities." *Id.* at 323.

[117] *Id.* at 324. The court in *Transco* also determined that a trial court's proper employment of an *in camera* inspection of the evidence in a challenge to a debarment or suspension should be limited to inquiries concerning the adequacy of the agency's notice; *i.e.*, whether the government has provided "as specific a notice as is possible under the circumstances." *Id.* at 325.

[118] ATL, Inc. v. United States, 736 F.2d 677, 684 (Fed. Cir. 1984) (citing *Transco*, 639 F.2d at 325).

[119] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 267, 281-84 (Recommendation 29-1(a) and related discussion). It is important to note, however, that even the Temporary Conference recommendation was limited to the holding of "a trial-type hearing before an impartial agency board or hearing examiner *in the event there are disputed questions of fact relevant to the debarment issue*." *Id.* at 267 (Recommendation 29-1(a)(ii)) (emphasis added). The Temporary Conference recognized that this level of hearing would be needed only if the facts were in dispute. Indeed, the ABA had provided comments suggesting that the Temporary Conference had omitted an important protection for debarment cases such as those following civil judgments or admitted wrongdoing in which the facts would not be in dispute. *See id.* at 283. Accordingly, the ABA had not urged for an adversarial hearing in such a situation, but for some opportunity to demonstrate present responsibility notwithstanding the wrongdoing. *Id.* The Temporary Conference agreed that hearings consistent with its recommendations should be afforded only in cases involving disputes over the material facts relevant to the debarment, and observed further: "Thus, for example, in most debarments based on criminal convictions or civil fraud judgments there would not ordinarily be remaining material issues of fact so that the debarment could proceed without a trial-type hearing." *Id.* The report also indicated that in those types of cases additional argument about present responsibility "would be made to the debarment official." *Id.*

[120] *See* John M. Steadman, *supra* note 8, at 822-23 (discussing the recommendation to require trial-like hearings before an impartial board or hearing officer in the event of disputed questions of fact).

[121] 397 U.S. 254 (1970).

In *Mathews* the Court set forth an analytical framework for examining due process challenges to governmental actions that the courts continue to follow.[123] In analyzing a question of whether due process required an oral hearing prior to the government's termination of an individual's Social Security disability benefits, the *Mathews* Court initially explained that before due process protections are implicated, the aggrieved party must first identify a protected property or liberty interest.[124] Then, if the reviewing court is satisfied that a property or liberty interest is at stake, the Court directed that the reviewing court should balance three factors to determine whether due process requires any additional procedures beyond those already in place:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[125]

Thus, subsequent to *Mathews*, a reviewing court's due process analysis must take into consideration two distinct inquiries: (1) Is a protected property or liberty interest implicated? (2) If so, are any additional procedures sought by the aggrieved party necessary in light of the *Mathews* three-pronged balancing test?[126] Of particular importance, when a reviewing court reaches the second part of the inquiry and applies the balancing test, the *Mathews* Court emphasized that broad rules are not necessarily controlling, and that due process is a matter for a case-by-case determination.[127]

---

[122] 424 U.S. 319 (1976). Of course, the earlier reports and recommendations, as well as the D.C. Circuit's decisions in *Gonzales* and *Horne Brothers*, preceded *Mathews v. Eldridge.*

[123] Despite some criticism, the Supreme Court has remained committed to the balancing approach delineated in *Mathews. See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 531-32 (4th ed. 1991).

[124] 424 U.S. at 332. On the facts of *Mathews* the government agency did not dispute that a protected property interest was at stake with respect to the disability benefits in question. *Id.*

[125] *Id.* at 335.

[126] On the facts in *Mathews* the Court determined that the agency's post-termination hearing procedures afforded to the aggrieved party were constitutionally adequate.

[127] Specifically, the Court stated that earlier

> decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and

With respect to the first prong of the *Mathews* test, *Gonzales v. Freeman* effectively established that no protected property interest is present.[128] Despite the lack of a property interest, however, later court decisions have determined that an agency's debarment or suspension of a government contractor triggers due process protections because the action impacts the contractor's liberty interests.[129]

Although several lower courts have decided that the debarment or suspension of a government contractor affects a contractor's constitutionally protected liberty interests, the Supreme Court has never specifically decided a case involving the constitutionality of the debarment and suspension regulations. Even in *Goldberg v. Kelly*, the Supreme Court relied on *Gonzales v. Freeman* for the proposition "that some governmental benefits may be administratively terminated *without* affording the recipient with a pre-termination evidentiary hearing."[130] In determining that a debarment or suspension implicates a government contractor's protected liberty interests, however, the lower courts have placed reliance on certain other decisions of the Supreme Court, particularly *Paul v. Davis.*[131]

In *Paul v. Davis* the complainant sought damages from a police official after the police distributed a flyer to local merchants identifying Davis as an "active shoplifter."[132] Although the police had previously arrested Davis for shoplifting,

---

circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morissey v. Brewer, 408 U.S. 471, 481 (1972).

Id. at 334.

[128] Gonzales v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (there is no "right" to be awarded a government contract). Of course, *Gonzales* preceded the *Mathews* analysis by more than a decade.

[129] *See, e.g.*, ATL, Inc. v. United States, 736 F.2d 677, 683 (Fed. Cir. 1984) (observing that "although a citizen has no *right* to a Government contract, and a bidder has no constitutionally protected *property* interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty") (footnotes omitted) (emphasis in original). *See also* Transco Sec., Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981); Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953, 962-63 (D.C. Cir. 1980); Shermco Indus., Inc. v. Secretary of the Air Force, 584 F.Supp. 76, 87 (N.D. Tex. 1984). *But cf.* Southeast Kan. Community Action Program, Inc. v. Lyng, 758 F.Supp. 1430, 1434-35 (D. Kan. 1991), *aff'd*, Southeast Kan. Community Action Program, Inc. v. Secretary of Agric., 967 F.2d 1452, 1458 (no liberty interest if government statement merely alleges incompetence as opposed to dishonesty or some other "badge of infamy"); PNM Constr., Inc. v. United States, 13 Cl.Ct. 745, 749 (1987) (no liberty interest implicated when agency found bidder nonresponsible because of a lack of competence rather than a lack of integrity). Of course, even if the government's action implicates a liberty interest, *Mathews* instructs that the courts must then apply a balancing test to determine whether the process afforded is sufficient for constitutional purposes. *See supra* text accompanying notes 125-27.

[130] *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (emphasis added).

[131] 424 U.S. 693 (1976). *See, e.g.*, Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953, 964-66 (D.C. Cir. 1980). Although not a debarment or suspension case, *Paul v. Davis* involved analysis of an alleged infringement of liberty.

[132] 424 U.S. at 695. Davis sought damages pursuant to 42 USC §1983 (1988). The flyer included Davis' name and photograph. *Id.*

he was never convicted.[133] Davis claimed that the distribution of the flyer and its wrongful assertion that he was an "active shoplifter" damaged his reputation, created a stigma, and impinged his protected liberty interests.[134] The Court rejected the constitutional claim and reasoned that earlier decisions had *not* established "that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."[135]

The *Paul* Court distinguished an earlier case, *Wisconsin v. Constantineau*,[136] in which the Court had found a liberty interest at stake when a police official caused a notice to be posted in local liquor stores directing the stores not to make sales or gifts of liquor to the plaintiff for one year.[137] The *Paul* court reasoned that the stigma stemming from the posting in *Constantineau*, standing alone, was not the reason due process was implicated in that case.[138] Instead, the *Paul* Court emphasized that the governmental action at issue in *Constantineau* had not only caused a stigma, but had deprived the affected individual of a right previously held under state law—the right to buy or obtain liquor.[139] In contrast, the state action against Davis was merely stigmatizing, and did not result in any change in his legal status. Accordingly, the Court denied his liberty interest claims.[140] Thus, *Paul v. Davis* requires a claimant to demonstrate either a stigma or damage to reputation *plus* some change of legal status to establish a liberty interest claim.[141]

A debarment or suspension would generally satisfy the "stigma-plus" test established in *Paul v. Davis*. In the usual notice of suspension or proposal for debarment, the government generally questions the contractor's or grantee's business integrity.[142] In addition, the government must place the affected concern's name on a government-wide list identifying that party as ineligible to receive new contract awards or other government benefits, as the case may be.[143] Finally, a suspension under either set of regulations or a proposed debarment under the FAR not only may impugn the affected party's reputation, but also limits that entity's ability, or liberty, to seek new contract awards or government benefits—activities that the party previously could pursue.

---

[133] 424 U.S. at 696. A local judge dismissed all charges against Davis shortly after city police circulated the flyer. *Id.*

[134] *Id.* at 697. Davis alleged that the stigma and damage to his reputation would seriously impair his future employment opportunities. *Id.*

[135] *Id.* at 701.

[136] 400 U.S. 433 (1971).

[137] *Id.* at 435. A state statute allowed such actions with respect to persons known to have engaged in "excessive drinking." *Id.* at 434. The Court determined that due process required notice and an opportunity to be heard before the state could engage in such "posting" under its liquor laws. *Id.* at 437. The Court reasoned that "[p]osting under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person." *Id.* The Court declared that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.*

[138] 424 U.S. at 709.

[139] *Id.* at 708-09.

[140] *Id.* at 712.

[141] One commentator has observed that contrary to the Court's contentions in *Paul v. Davis*, the determination that due process requires a showing of "stigma-plus" was a considerable departure from the reasoning in *Constantineau* and other earlier cases. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 702 (2d ed. 1988).

As mentioned above, lower courts have determined that a debarment or suspension affects a contractor's protected liberty interests. The D.C. Circuit's decision in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*[144] was the first post-*Mathews* opinion to expand upon the earlier analysis from *Gonzales v. Freeman* and consider the due process issues in light of both *Mathews* and *Paul v. Davis.* Although not a legal challenge to an actual debarment,[145] *Old Dominion* involved an Air Force denial of individual contract awards to Old Dominion

---

[142] *See* FAR 9.407-2, 48 CFR § 9.407-2 (1993) (setting out the grounds for suspension); FAR 9.406-2, 48 CFR § 9.406-2 (1993) (setting out the grounds for debarment). *See also* 28 CFR §§ 67.305, .405 (1993) (an example of similar provisions in the common rule for nonprocurement actions). Of course, the regulations also permit a debarment based on a history of unsatisfactory performance, a matter of incompetence, not integrity. *See* FAR § 9.406-2(b)(1), 48 CFR § 9.406-2(b)(1) (1993); 28 CFR § 67.305(b)(2) (1993). No liberty interest would be at stake in such a debarment. *See* Southeast Kan. Community Action Program, Inc. v. Lyng, 758 F.Supp. 1430, 1434-35 (D. Kan. 1991), *aff'd*, Southeast Kan. Community Action Program, Inc. v. Secretary of Agric., 967 F.2d 1452, 1458 (no liberty interest if government statement merely alleges incompetence as opposed to dishonesty or some other "badge of infamy"); PNM Constr., Inc. v. United States, 13 Cl.Ct. 745, 749 (1987) (no liberty interest implicated when agency found bidder to be nonresponsible based on a lack of competence rather than a lack of integrity). *See also* Coleman Am. Moving Serv., Inc. v. Weinberger, 716 F.Supp. 1405, 1414 (M.D. Ala. 1989) (no liberty interest implicated in a suspension *based on an indictment* because "any stigma that might attach flows not from underlying charges advanced by the government [procuring agency], but from the existence of the indictment itself").

[143] *See* FAR 9.404, 48 CFR § 9.404 (1993); 28 CFR § 67.500 (1993). Proposed debarments do not have immediate preclusive effect under the nonprocurement rules, however. *See supra* notes 68-70 & accompanying text.

[144] 631 F.2d 953 (D.C. Cir. 1980).

[145] *Old Dominion* was not a direct challenge to an agency debarment or suspension. Instead, the case involved individual agency refusals to award contracts to Old Dominion based on contract-by-contract determinations that the contractor lacked present responsibility. *See* Joseph A. Calamari, *supra* note 26, at 1155. Issues concerning a contractor's present responsibility (or lack thereof), however, are closely related to the lack of integrity often at the heart of an agency suspension or debarment. Indeed, successive agency findings of contractor nonresponsibility based on the same facts and circumstances without notice and an opportunity to be heard can give rise to a successful challenge to the agency actions on grounds that the practice amounts to a de facto debarment. *See, e.g.*, Shermco Indus., Inc. v. Secretary of the Air Force, 584 F.Supp. 76 (N.D. Tex. 1984); Related Indus., Inc. v. United States, 2 Cl.Ct. 517 (1983); Art-Metal—USA, Inc. v. Solomon, 473 F.Supp. 1 (D.D.C. 1978). The contractor in *Old Dominion* raised a de facto debarment argument, but the court did not directly address the issue. *See* 631 F.2d at 961 n.17. For a more detailed consideration of *Old Dominion*, see Lawrence Shire, Recent Decision, 50 GEO. WASH. L. REV. 90 (1981). One of the concerns raised in the 1962 ACUS Temporary Conference recommendations related to the problem of de facto debarments. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 269, 291-92 (Recommendation 29-4 and related discussion).

Dairy Products, Inc. based on findings of contractor nonresponsibility relating to the company's alleged lack of a "satisfactory record of integrity."[146] The court determined that the government action implicated a protected liberty interest.[147] Although the government argued that the case involved only an injury to the contractor's reputation, not actionable in light of *Paul v. Davis*,[148] the court concluded that the combined stigma to the contractor and the accompanying loss of government contract work satisfied the "stigma-plus" test of *Paul v. Davis*.[149]

Subsequent to *Old Dominion*, courts in later cases have directly applied the liberty interest analysis to the review of challenges to debarment and suspension actions. For example, the Sixth Circuit in *Transco* relied on *Old Dominion* for the proposition that a suspension affects a liberty interest "when that denial is based on charges of fraud and dishonesty."[150] Then, in *ATL, Inc. v. United States*,[151] the Federal Circuit observed:

> [I]n suspension cases it is recognized that, although a citizen has no *right* to a Government contract, and a bidder has no constitutionally protected *property* interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty. Accordingly, the minimum requirements of due process come into play.[152]

---

[146] Old Dominion, 631 F.2d at 958. The contractor challenged the action by claiming a due process right to be given notice and an opportunity to be heard before being found nonresponsible on lack of integrity grounds. *Id.* at 961.

[147] *See id.* at 966. The contractor did not claim to have any protected property interest. *Id.* at 961. The court observed that although then-Judge Burger in *Gonzales v. Freeman* had observed that receiving a government contract was not a property right, the government still could not act arbitrarily in causing a contractor to become ineligible to receive government contracts. *See id.* at 962 (citing Gonzales v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964)). The court then compared the earlier analysis from *Gonzales* to the *Mathews*-driven question of whether the government's precluding a contractor from receiving a contract award based on a lack of integrity raises a cognizable liberty interest claim.

[148] *Id.* at 964-65.

[149] *Id.* at 966. The court also distinguished the facts in *Old Dominion* from the Supreme Court's earlier analysis in Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (involving the refusal to find a protected liberty interest in a case in which a state university refused to reemploy a nontenured instructor). The *Old Dominion* court observed that in *Roth* the Supreme Court had suggested that *Roth* may have been a different case had the instructor been barred by virtue of his lack of reemployment from all other public employment in state universities. 631 F.2d at 963 (citing *Roth*, 408 U.S. at 573-74). Similarly, the *Old Dominion* court reasoned that the agency had effectively barred the government contractor from further public work.

[150] Transco Security, Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981).

[151] 736 F.2d 677 (Fed. Cir. 1984).

[152] *Id.* at 683 (footnotes omitted) (emphasis in original). *Accord* Shermco Indus., Inc. v. Secretary of the Air Force, 584 F.Supp. 76, 87 (N.D. Tex. 1984).

The lower courts to date have clearly embraced the notion that a debarment or suspension may impact a government contractor's liberty interests.

As I have argued elsewhere,[153] although the *Paul v. Davis* analysis is a foundation for lower court determinations that a debarment or suspension may impact a contractor's protected liberty interests, a later decision by the Supreme Court calls such analysis into question. In *Siegert v. Gilley*,[154] the Supreme Court appeared to retreat from the analysis set forth earlier in *Paul v. Davis.* *Siegert* involved a claim for money damages by a government psychologist, Siegert, against his former supervisor, Gilley; he alleged that Gilley had violated his liberty interests through the writing of a negative recommendation letter.[155] The Supreme Court affirmed the dismissal of Siegert's claim by holding that Siegert had failed to allege a violation of a clearly established constitutional right.[156]

The decision in *Siegert* represents an apparent narrowing of the "stigma-plus" test from *Paul v. Davis.* Siegert had argued that the combination of the allegedly malicious letter and the resulting impairment of his ability to retain government employment satisfied the "stigma-plus" test of *Paul v. Davis.*[157] The five-justice majority[158] acknowledged that the letter written by Siegert's former supervisor "would undoubtedly damage the reputation of one in his position, and impair his future employment prospects," but declined to find that such an injury raised a constitutional claim.[159] Instead, the Court took a narrow view of *Paul v. Davis* and reasoned

---

[153] *See* Brian D. Shannon, *supra* note 6 at 15-19.

[154] 111 S.Ct. 1789 (1991).

[155] *Id.* Siegert had been a clinical psychologist at a federal hospital in Washington from 1979-85. Gilley was Siegert's supervisor during Siegert's last several months at the facility. Siegert resigned upon receiving a notice that the government intended to terminate his employment. *Id.* at 1791. Although Siegert later began working for an Army hospital in Germany, because of agency "credentialing" requirements, he needed a recommendation from Gilley to maintain this job. *Id.* Gilley sent the Army a letter declining to recommend Siegert, stating that he viewed "Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have known in my thirteen years [at the federal hospital]." *Id.* Not surprisingly, the Army denied credentials to Siegert based on the letter and subsequently terminated him. *Id.*

[156] *Id.* at 1793. This was actually a different basis for dismissal than that rendered by the court below, and the parties apparently neither fully briefed nor argued the question of whether Siegert had properly asserted the deprivation of a protected liberty interest. *See id.* at 1795 (Kennedy, J., concurring); *id.* at 1795-96 (Marshall, J., dissenting).

[157] *See id.* at 1794.

[158] Chief Justice Rehnquist wrote for the Court. Justice Kennedy concurred in the result but based on the court of appeals' decision regarding the former supervisor's qualified immunity; he found it "unwise" to reach the constitutional question without a decision on the point by the court of appeals and full briefing and argument at the Court. *See id.* at 1795 (Kennedy, J., concurring).

[159] *Id.* at 1794.

> that injury to reputation by itself was not a "liberty" interest protected under the Fourteenth Amendment. We pointed out [in *Paul*] that our reference to a governmental employer stigmatizing an employee in *Board of Regents of State Colleges v. Roth* was made in the context of the employer *discharging or failing to rehire* a plaintiff who claimed a liberty interest under the Fourteenth Amendment.[160]

The Court also observed that "[t]he alleged defamation [by Gilley] was not uttered incident to the termination of Siegert's employment by the hospital, since he voluntarily resigned from his position at the hospital, and the letter was written several weeks later."[161] Accordingly, the *Siegert* majority focused their liberty interest analysis on whether a governmental entity had stigmatized an employee in conjunction with an immediate termination from employment or a refusal to rehire—notwithstanding the employee's allegations that his *future* government employment options had become unavailable because of the government's actions.[162]

In applying *Siegert* to the debarment and suspension context, *Siegert* appears to require a more substantial showing than *Paul's* "stigma-plus" for identifying a protected liberty interest. If the Court in *Siegert* indeed determined that a protected liberty interest is at stake only in a narrow setting such as when stigma is accompanied by an immediate governmental discharge or failure to rehire an employee, that could affect the due process analysis in debarment and suspension challenges. Specifically, Siegert alleged that his former supervisor's letter had caused him not to be "credentialed," thereby precluding him from future government employment.[163] Similarly, a notice of suspension or proposed debarment has the immediate effect of keeping a contractor from being eligible to receive new government contract awards.[164] A debarment or suspension does not usually result in any "discharge" or termination of existing government "employment"—ongoing contracts.[165] Instead, the debarment or suspension results primarily in a halt on any future government "employment"—new contract awards. Even though Siegert alleged a loss of future government work because of the government official's stigmatizing action, the majority determined that no liberty interest was at stake.[166] Accordingly, *Siegert* may cast doubt on the lower court opinions holding that a suspension or debarment implicates a contractor's protected liberty interests.[167]

---

[160] 111 S.Ct. at 1794 (emphasis added) (citations omitted).

[161] *Id.*

[162] Indeed, Justice Marshall, in his dissent in *Siegert*, pointed out that *Paul's* "stigma-plus" standard had been *met* "because the injury to Siegert's reputation caused him [also] to lose the benefit of *eligibility for future government employment.*" 111 S.Ct. at 1797 (Marshall, J., dissenting) (emphasis in original).

[163] *Id.*

[164] Under the nonprocurement rules, a suspension also has immediate effect, but a notice of proposed debarment has no automatic preclusive effect. *See, e.g.*, 28 CFR §§ 67.411, .312 (1993).

[165] As a general matter agencies may continue existing contracts. FAR 9.405-1(a), 48 CFR § 9.405-1(a) (1993). On the other hand, the government may not renew or otherwise extend any current contracts. *Id.* § 9.405-1(b). In contrast, the termination of an existing contract would affect a contractor's property interests.

Even assuming that the lower courts' analysis that a liberty interest is at stake in a debarment or suspension action is still sound, *Mathews v. Eldridge* requires an analysis of an additional question: what process is due?[168] The courts that have considered constitutional challenges to the debarment and suspension regulations—and the rules' lack of any requirements for pre-deprivation hearings—have generally upheld the validity of the regulations as applied to the facts of the underlying agency actions.[169]

---

[166] *Cf.* 111 S.Ct. at 1799 (Marshall, J., dissenting). The only aspect of a debarment or suspension that appears to track the narrow focus set forth in *Siegert* relates to the FAR's prohibition against renewing or otherwise extending *existing* contracts. In this respect, a debarment or suspension would be akin to the language in *Siegert* that the government's failure to "rehire" an employee, when coupled with a damage to reputation, amounts to the potential deprivation of a liberty interest. *See* 111 S.Ct. at 1794.

[167] Justice Marshall certainly hinted so in dissent. *See* 111 S.Ct. at 1799 (Marshall, J., dissenting) (observing that the majority opinion was inconsistent with the D.C. Circuit's frequent espousal of the view that the government deprives a person "of a protected liberty interest when stigmatizing charges 'effectively foreclos[e] [his or her] freedom to take advantage of other Government employment opportunities.'") (quoting from *Old Dominion*, 631 F.2d at 964). *But see* Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594, 598 (D.C. Cir. 1993) (in which the government in a case arising after *Siegert* did "not deny that some process [wa]s due because Reeve ha[d] a liberty interest in avoiding the damage to its reputation and business caused by a stigmatizing suspension.").

[168] *See supra* notes 125-27 & accompanying text. More specifically, *Mathews* requires an examination of whether due process requires more procedures than those the agency has already provided or intends to provide.

[169] *See, e.g.*, James A. Merritt & Sons v. Marsh, 791 F.2d 328 (4th Cir. 1986); Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984); Textor v. Cheney, 757 F.Supp. 51, 59 (D.D.C. 1991); Mainelli v. United States, 611 F.Supp. 606, 613-14 (D.R.I. 1985); Shermco Indus., Inc. v. Secretary of the Air Force, 584 F.Supp. 76, 87-90 (N.D. Tex. 1984). *Cf.* ATL, Inc. v. United States, 736 F.2d 677 (Fed. Cir. 1984) (generally upholding the procedures as applied but invalidating the agency action, in part, with respect to notice issues); Transco Security, Inc. v. Freeman, 639 F.2d 318, 322-23 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981) (upholding hearing procedures but invalidating insufficient notice of charges). *See also* Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 248 (1988) (unanimously upholding an FDIC suspension of an indicted bank president even though applicable banking statutes did not provide for any pre-suspension hearing); Robinson v. Cheney, 876 F.2d 152, 163 (D.C. Cir. 1989) (holding that the standard for a debarment based on a "cause of so serious or compelling a nature that it affects the present responsibility" of the contractor is not unconstitutionally vague as applied); GAO BRIEFING REPORT, *supra* note 30, at 10 (concluding that "the current [debarment and suspension] process maintains an appropriate balance between protecting the government's interests in its contractual relationships, and providing contractors with due process."); ABA PRACTITIONER'S GUIDE, *supra* note 5, at 153 (observing that "only an exceptional suspension or debarment decision will likely contain a constitutional or procedural flaw meriting court review").

In contrast to due process attacks, contractors have enjoyed somewhat more success in challenging debarments and suspensions in cases in which an agency either did not follow the regulations or otherwise acted in an arbitrary and capricious manner subject to reversal under the APA, 5 USC §706(2)(A) (1988).

B. Exhaustion of Administrative Remedies

Although the Supreme Court has seldom considered cases involving debarment or suspension actions, the Court recently had the opportunity to consider a legal question arising in the context of a challenge to a HUD debarment. The issue at stake, however, centered on the application of the doctrine of exhaustion of administrative remedies. In *Darby v. Cisneros*,[170] a HUD administrative law judge had determined to debar a real estate developer and several affiliates for violating an agency mortgage insurance rule.[171] Under HUD regulations, either an administrative law judge or a judge from the HUD Board of Contract Appeals conducts the debarment proceedings in an administrative hearing.[172] The administrative law judge's determination to debar a participant or contractor after such a hearing is

> final unless...the Secretary or the Secretary's designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. The 30 day period for deciding whether to review a determination may be extended upon written notice of such extension by the Secretary or his designee. Any party may request such a review in writing within 15 days of receipt of the hearing officer's determination.[173]

In *Darby* the debarred concerns immediately filed suit challenging the administrative law judge's determination rather than seek internal review within the agency as authorized by this regulation.[174] The agency moved to dismiss the

---

See, e.g., Novicki v. Cook, 946 F.2d 938, 942-43 (D.C. Cir. 1991) (invalidating an agency decision to debar a corporation's president based on a finding that the agency record was insufficient to show that the official had "reason to know" of misconduct by other corporate officials); Caiola v. Carroll, 851 F.2d 395 (D.C. Cir. 1988) (finding arbitrary and capricious an agency's decision to debar certain corporate officials of a convicted corporation but not others); Silverman v. Dep't of Defense, 817 F. Supp. 846, 849 (finding that agency abused its discretion in not considering mitigating factors in debarring a contractor who had been convicted of misdemeanor conversion); Sterlingwear of Boston, Inc. v. United States, 11 Cl.Ct. 879, 885 (1987) (determining that the debarring agency violated the regulations by making a decision not to hold a fact-finding proceeding *before* the contractor submitted its information in opposition to the proposed debarment). *But see* Shane Meat Co. v. United States Dep't of Defense, 800 F.2d 334, 336-38 (3d Cir. 1986) (overturning trial court's determination that a three-year debarment was arbitrary and capricious); Mikulec v. Department of the Air Force, No. 84-2248 (D.D.C. June 27, 1985) (unreported) (holding that it was not arbitrary and capricious for an agency to suspend a corporation based on the corporate president's arson indictment for acts allegedly occurring some years earlier).

[170] 113 S.Ct. 2539 (1993).

[171] *Id.* at 2541-42.

[172] *See* 24 CFR § 24.313 (1993). The current HUD procedures are more formal than those of most agencies.

[173] *Id.* §24.314(c).

[174] 113 S.Ct. at 2542.

complaint on the ground that the challengers had failed to exhaust administrative remedies by declining to appeal the administrative law judge's decision within the agency.[175]

At issue before the Court was whether the APA requires disgruntled parties to exhaust administrative remedies in a case in which no statute or agency regulation specifically mandates exhaustion. In construing provisions of the APA, the Court ultimately determined that exhaustion is not required in such a case.[176] In reaching this result, the Court examined section 10(c) of the APA concerning "actions reviewable."[177] In particular, the case turned on the Court's interpretation of the last sentence of section 10(c), which provides:

> Except as otherwise expressly required *by statute*, agency action otherwise final is *final* for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or *unless the agency otherwise requires by rule* and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[178]

By applying a plain meaning analysis to this portion of the APA, the Court determined that in cases governed by the APA, "an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or...an agency rule...."[179] Accordingly, because no statute or HUD rule expressly required the debarred persons in *Darby* to appeal within the agency, they could bypass the agency appeal and proceed to court.

Will *Darby v. Cisneros* have a major impact on the debarment and suspension process? It is probably unlikely. Indeed, as of this writing HUD has not yet revised its debarment regulations concerning internal appeals. Clearly, the agency could alter its debarment rules to require appeals from administrative law judges to the Secretary or to a designated debarment official.[180] On the other hand, the agency might not want to require appeals in all cases as a prerequisite to judicial review.[181] Even if the regulations remain unchanged, in some cases the aggrieved parties might still opt to pursue internal appeals within the agency in the hope of a favorable ruling.[182]

---

[175] *Id.* The district court denied the motion by relying on one of the traditional exceptions to the exhaustion doctrine: that resort to the administrative remedy would have been inadequate and futile. *Id.* The Fourth Circuit reversed, reasoning that there was no evidence to suggest that an administrative appeal would have been futile. *Id.*

[176] 113 S.Ct. at 2548. The debarred challengers had sought judicial review of the HUD determination pursuant to the APA on the ground that the debarments allegedly "were imposed for punishment, in violation of HUD's own debarment regulations, and therefore were 'not in accordance with law' within the meaning of § 10(e)(B)(1) of the APA, 5 USC § 706(2)(A)." *Id.* at 2542.

[177] 5 USC § 704 (1988).

[178] *Id.* (emphasis added).

[179] 113 S.Ct. at 2548. In a portion of the opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas did not join, the Court detailed how the legislative history provided support for their plain meaning analysis. *Id.* at 2545-48.

Outside of HUD, the *Darby* decision should not have a great impact on the debarment and suspension process. HUD's procedures are more formal than those of most agencies. In many agencies an administrative law judge is not going to be the agency official issuing the debarment or suspension decision. Instead, high agency officials will have made these determinations, often without the regulatory prospect of internal agency appeals.

---

[180] The agency apparently intends to change its regulations to mandate internal exhaustion. *See* ABA PRACTITIONER'S GUIDE, *supra* note 5, at 103. On the other hand, HUD may revise its current procedures altogether. *See infra* note 222. Other agencies are amending internal appeals rules in other contexts given this decision. *See, e.g.*, 59 Fed. Reg. 23,119 (May 5, 1994) (reflecting Nuclear Regulatory Commission response to *Darby* as part of implementation of the Equal Access to Justice Act).

[181] *Cf.* Kisser v. Kemp, 786 F. Supp. 38, 40-42 (D.D.C. 1992), *rev'd on other grounds*, Kisser v. Cisneros, 14 F.3d 615 (1994). In *Kisser* HUD first suspended, then debarred a former officer of a HUD coinsured lender in separate and independent enforcement proceedings. Kisser successfully challenged both actions in the district court, but on appeal the court upheld the agency's debarment, and HUD did not appeal the trial court's vacating of the initial suspension. 14 F.3d at 618, 623. With respect to that vacated suspension—which was not a subject of the appeal—even though the agency ALJ had ordered the lifting of the suspension following a hearing, the HUD Secretary's designee nonetheless ordered the suspension reinstated upon an internal appeal by the agency. *Id.* at 617. The district court ruled that the reinstated suspension "was arbitrary and capricious because the Secretary's designee, on reviewing the ALJ, had *ignored the record* before her; *asserted her conclusions without evidentiary support*; and also *violated the relevant regulations*, by putting the burden of proof on Kisser to show that he should not be suspended." *Id.* at 618 (emphasis added).

[182] One administrative law scholar has been extremely critical of the Court's decision in *Darby v. Cisneros*. *See* Bernard Schwartz, *"Apotheosis of Mediocrity"? The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 160-62 (1994). Professor Schwartz has suggested that the Court's decision was contrary to "elementary exhaustion doctrine" and gutted compelling reasons for exhaustion such as "administrative autonomy" and "sound judicial administration." *Id.* at 161-62. Professor Schwartz has also warned that *Darby* will result in "a proliferation of appeals from ALJ decisions by agencies themselves" thereby causing "the ALJ's [to become] the final arbiters—making it difficult for the agency heads to ensure conformity with their policies in the agency decision process." *Id.* at 162. Although outside the general scope of this report, both the *Darby* decision and the analysis by Professor Schwartz suggest that further research may be warranted regarding whether the APA should be amended to permit courts to employ the exhaustion doctrine more broadly in APA cases.

V. Degrees of Formality

Over the years, commentators have often attacked the debarment and suspension regulations' constitutionality or desirability, particularly with respect to their provisions for post-deprivation hearings.[183] In view of the many court decisions upholding the process, however, arguments that due process requires the adding of more procedures to the debarment and suspension regulations are largely unfounded. Given the significant governmental interests at stake, even though there may be some modicum of protected liberty implicated by a debarment or suspension, an adequate notice combined with the post-deprivation process set forth in the regulations will generally provide the affected entity with a constitutionally sufficient opportunity to attempt to clear its name. Even if the current procedures comport with constitutional requirements, however, minimal due process requirements generally represent a floor rather than a ceiling. Should additional procedures be added?

It is worth noting that the ABA's Public Contract Law Section has over the years been actively engaged in seeking more process for contractors facing debarment or suspension. Roughly contemporaneously with the OFPP's development of government-wide debarment and suspension procedures, the ABA adopted certain "principles" relating to debarment and suspension. These principles would have afforded contractors far more process than that set forth in the OFPP policy letters.[184] Indeed, in 1984 Congressman Sam Hall introduced a bill that would have required a government-wide board staffed with administrative law judges who would have handled procurement debarments and suspensions.[185] The bill was based largely on a series of measures recommended in 1982 by the ABA's House of Delegates.[186] Although the attempted legislation died in committee,[187] it would have gone far beyond the OFPP efforts.

---

[183] *See, e.g.*, Joseph A. Calamari, *supra* note 26, at 1169-74 (acknowledging the constitutionality of the hearing procedures, but recommending that agencies use administrative law judges and more formal hearings); George M. Coburn, *supra* note 26 *passim*; Donna M. Duvall, *supra* note 26 *passim* (criticizing procedures for not including standards for agencies to assess "public interest"); Lisa A. Everhart, *supra* note 26, at 756-66; Gerald P. Norton, *supra* note 26, at 652 (questioning the validity of the lack of pre-suspension hearing opportunities). *See also* Patrick J. DeSouza, *Regulating Fraud in Military Procurement: A Legal Process Model*, 95 YALE L.J. 390, 407 (1985) (recommending pre-suspension and pre-debarment hearings to allow courts to "assume a more active role in addressing fraud").

[184] *See generally* George M. Coburn, *supra* note 26, at 577-79; James J. Graham, *supra* note 26, at 236-37.

[185] *See Rep. Hall Introduces Bill to Create Gov't-Wide Debarment/Suspension Board*, 41 Fed. Cont. Rep. (BNA) 240 (Feb. 13, 1984).

[186] *Id.*

[187] *See* H.R. 4798, 98th Cong., 2d Sess. (1984). *See also* Paul L. Friedman, *supra* note 26, at 306-08 (1985).

For example, Congressman Hall's bill, H.R. 4798, would have created one independent "Debarment and Suspension Board" comprised of at least three administrative law judges to consider all procurement debarment and suspension cases.[188] The act would have limited the imposition of debarment to a contractor only upon a showing of "a substantial and continuing risk that the person…[would] not substantially perform all of the material, legal and contractual obligations and requirements" of federal contracts or the obtaining of government contracts.[189] Moreover, the bill called for hearings before the "super-board" with a requirement that the government prove the grounds for debarment upon a clear and convincing evidentiary showing.[190] With respect to suspensions, the bill would have permitted that remedy only when there was a strong likelihood that a debarment would follow and upon a showing of exceptional circumstances.[191] The bill also directed the holding of a hearing prior to any suspension unless the initiating agency could demonstrate by affidavit the likelihood of "immediate and irreparable injury, loss, or damage."[192] Clearly, H.R. 4798 would have substantially changed the debarment and suspension process and created a judicialized forum for consideration of these matters. The bill never gained momentum, however, and the ABA's efforts to establish one government-wide board replete with trial-like proceedings generally came to an end as well.[193]

---

[188] *See* H.R. 4798, § 201.

[189] *Id.* § 102(a) (to have been codified at 5 USC § 561(a)(1)(A)).

[190] *Id.* (to have been codified at 5 USC § 562(a)).

[191] *Id.* (to have been codified at 5 USC § 561(b)(1)(A)). The bill would have also limited suspensions to 60 days, but with extensions allowed upon the initiating agency's showing of further exceptional circumstances. *Id.* (to have been codified at 5 USC § 561(b)(2)(A)-(B)).

[192] *Id.* (to have been codified at 5 USC § 563(b)(1)-(2)).

[193] As one commentator observed about the bill, "[N]o hearings were ever held, no co-sponsors were ever obtained, and the bill died at the end of the 98th Congress." *See* Howard W. Cox, *supra* note 26, at 437 n.79. A few years later the ABA Section on Public Contract Law somewhat more narrowly called for a single board within the Department of Defense to handle all debarment and suspension cases for that agency. THE FAR SYSTEM ITS CRITICAL FORMATIVE YEARS 1984-1986, A.B.A. SEC. PUB. CONTRACT LAW C-71.1, 71.3 (1988) (Letter from Section Chairman James J. Myers to David Packard, Chairman, President's Blue Ribbon Commission on Defense Management (Jan. 24, 1986)) [hereinafter "Myers Letter"]. Even in its call for a single Defense Department board to decide these matters, the proposal recommended that the appropriate procuring agencies retain responsibility for initiating all debarment and suspension actions. *See id.*

Three years ago, there was one more brief effort to consolidate the debarment and suspension responsibilities in the Department of Defense. The 1992 Department of Defense Appropriations Bill, as passed by the House of Representatives on June 7, 1991, included a provision that no funds could "be used to pay the salaries of debarment/suspension officials [within the Department of Defense] unless such personnel…[were] assigned to a consolidated office of Debarment and Suspension within the Office of the Inspector General." H.R. 2521, 102d Cong., 1st Sess., § 8110, 137 CONG. REC. H4175 (1991). The final bill excluded this ill-conceived plan. The House apparently considered creating a single debarment and suspension authority for the agency because the House Appropriations Committee was troubled that at least one Defense agency had been too aggressive in imposing the suspension remedy. *See* H.R. REP. NO.

There appears to be little interest in further consideration of procedural changes to create a single board to hear all government debarment and suspension cases. In responses to inquiries I posed to various agency officials and private counsel, both groups were generally opposed to the creation of a single government-wide board. Several of the agency officials stressed that debarment and suspension determinations are chiefly business decisions by the affected agencies. Accordingly, it would be cumbersome to divorce the administrative decision-making process from an agency's business judgment.[194] Others argued against a centralized system because of concerns that such a board could be overly formal and bureaucratic.[195] Similarly, corporate counsel for a large defense contractor objected to a single government board on comparable grounds. He reasoned that because the procuring agency's contracting officers are charged with making responsibility determinations prior to the award of contracts, the agency should also have a stake in making global decisions about present responsibility through debarment or suspension actions.[196] In contrast, one government contracts attorney from private practice provided comments supporting the idea of one large board to enhance consistency and rationality.[197]

There is no need to consider further the creation of one board to handle all debarment and suspension matters for the federal government. Neither the

---

95, 102d Cong., 1st Sess. 238 (1991). There was some degree of irony in the bill's choice of the Department's Office of Inspector General as the proposed debarment and suspension authority given that office's long-standing aggressive attitude toward the liberal imposition of debarment and suspension against government contractors. *See, e.g.*, OFFICE OF INSPECTOR GEN., DEP'T OF DEF., REPORT ON SUSPENSION AND DEBARMENT ACTIVITY WITHIN THE AIR FORCE 11-13 (April 29, 1988); OFFICE OF INSPECTOR GEN., DEP'T OF DEF., REVIEW OF SUSPENSION AND DEBARMENT ACTIVITIES WITHIN THE DEP'T OF DEF. 45, 49-50, 74-75 (May 1984). For further criticism of this proposal, see Brian D. Shannon, *supra* note 6, at 33-43.

[194] Many of the persons who responded asked that I not directly attribute their comments to them. I am honoring their requests through respect for their stated wishes and in appreciation of their candor. I have retained their letters on file.

[195] In turn, a more rigid structure would be less responsive to various agencies' particular needs and less able to respond quickly to new developments. Processing delays could pose a problem. A more formalized system could also be detrimental to a smaller business in terms of the resources that might be necessary to participate in the forum.

[196] Correspondingly, the agency debarring official should have sufficient expertise concerning the agency's standards and practices to assist in making objective and fair decisions.

[197] Similarly, but on a more narrow scale, the report by the 1962 ACUS Temporary Conference review committee called for a single board or independent examiner for all of the Defense Department to "achieve greater uniformity of decision." TEMPORARY CONFERENCE REPORT, *supra* note 9, at 283. On the other hand, the corporate counsel who provided comments in opposition to a single board expressed the view that the employment of a super-board would lead to a lack of reality in decision-making. Several members of the Debarment & Suspension Committee of the ABA's Public Contract Law Section also expressed opposition to the idea of a single board. Interview with Richard Bednar, Chair, & Various Members, Debarment & Suspension Committee, ABA Public Contracts Section, in Washington, D.C. (May 6, 1994). They favored maintaining an ability to deal with agencies with which contractors may be most familiar.

agencies nor many private counsel support the idea. Such a move would result in a body of decision-makers with no direct involvement in the business decisions of the various agencies. It could be cumbersome and limit flexibility. It is also questionable whether the change could result in any cost savings, particularly given that initiating agencies would still need to be involved in the process, and numerous officials would likely be necessary to staff the board. Moreover, the achievement of greater uniformity through the implementation of government-wide regulations has helped in reducing the prospects for disparity in treatment.

Although not direct attempts at procedural reform through the regulatory process, counsel for contractors subject to debarment actions have also endeavored to generate procedural change through judicial challenges to pending debarments and suspensions. In addition to the due process challenges addressed above,[198] still other cases have arisen during the last few years in which contractors have asserted that certain aspects of the APA's formal adjudicatory procedures should apply to debarment and suspension matters. For example, in *Leitman v. McAusland*[199] an individual and a corporate contractor challenged their three-year debarments from purchasing surplus and foreign excess personal property from the federal government.[200] As one of their grounds for challenging the Defense Logistics Agency's (DLA's) debarment decision, the contractors asserted that a DLA official had violated section 554(d) of the APA "by acting as both prosecutor and debarring official at the hearing."[201] The agency official, who was an attorney for the agency, had presided as the hearing officer in debarment proceedings involving the complaining contractors, and ultimately issued a notice of debarment.[202] The contractors urged that this agency official had improperly taken over the role of prosecuting officer at the hearing by questioning the witnesses.[203] The court acknowledged that the parties had raised a "thorny issue" regarding whether the APA's formal adjudicative procedures apply to debarment proceedings, but avoided deciding the question.[204] Instead, the court simply assumed, without deciding, that the APA's provisions for formal adjudication applied to the case, and then decided that the agency had not violated the act's limits on combining prosecutorial and decisionmaking functions.[205] The court reasoned that merely because the official conducting the hearing asked questions of some of the witnesses, he had not placed himself in the position of prosecutor.[206] Accordingly, even if the debarred concerns could have established a constitutional basis for applying the APA's formal adjudicatory procedures to the debarment process, the complainants were unable to prove any violation.

---

[198] *See supra* notes 94-118, 169 & accompanying text.

[199] 934 F.2d 46 (4th Cir. 1991).

[200] *See id.* at 47-48.

[201] *Id.* at 49. The contractors also urged, *inter alia*, that the agency official presiding at the debarment hearing had initiated improper ex parte contacts. *See id.* The court rejected this latter claim. *Id.* at 50.

[202] *Id.* at 48-49.

[203] *See id* at 49. A different employee represented the agency at the hearing and served as the prosecuting official. *Id.*

[204] *See id.* The court correctly observed that no statute requires debarment proceedings to be "on the record" for purposes of section 554(a) of the APA, but also observed that "a judicial gloss has found that these provisions [of the APA] apply to certain hearings required by the Constitution, rather than a statute." *Id.* (citing Wong Yang Sung v. McGrath, 339 U.S. 33 (1949)).

The Ninth Circuit has more directly confronted an issue concerning whether any of the APA's formal adjudicative procedures apply to the debarment and suspension process. In *Girard v. Klopfenstein*[207] the Ninth Circuit considered a challenge involving still another aspect of the APA's procedures for formal adjudication of administrative disputes. In *Klopfenstein* two debarred contractors challenged their debarments by urging that the agency's procedures were invalid because they did not require an administrative law judge to preside over debarment proceedings.[208] The court determined that the APA did not apply to the case "because a debarment hearing is not required by a statute."[209] The court reasoned that because there is no *statute* that authorizes a person who is the subject of a debarment proceeding to receive an evidentiary hearing, then no enabling legislation exists to require an "on the record" proceeding for purposes of §554(a) of the APA.[210] Accordingly, the court concluded that the express terms of the APA do not apply in a debarment proceeding to require the presence of an administrative law judge.[211]

---

[205] 934 F.2d at 49.

[206] *See id.* The court analogized the agency official's questions to those that are generally permitted for a trial judge and observed that most of the questions were related to attempts either to clarify matters or move the proceedings along. *Id.*

[207] 930 F.2d 738 (9th Cir.), *cert. denied*, 112 S.Ct. 173 (1991). In *Klopfenstein* the Agricultural Stabilization and Conservation Service debarred two contractors for selling improper cheese to the agency. The questionable cheese happened to be ineligible for that particular government cheese-buying program. *See id.* at 739.

[208] *See id.* If an agency enabling statute requires a matter to be resolved "on the record," thereby triggering formal adjudication under section 554(a) of the APA, then one of the elements of the formal adjudicative proceeding is the opportunity for a hearing before an administrative law judge. *See* 5 USC §§ 554(c)(2), 556, 557 (1988).

[209] 930 F.2d at 741.

[210] *See id.* The court relied on *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), for the proposition that debarment is not a creature of statute, but part of the inherent authority of contracting agencies. *See id.*

[211] *See id.* at 742. Administrative law judges from HUD are of the view that the law should be changed to make debarment and suspension actions subject to the formal adjudication requirements of the APA. Letter from Alan W. Heifetz, Chief Administrative Law Judge, HUD, to Brian D. Shannon 2 (April 15, 1994) (on file with author). HUD debarment proceedings are already conducted in front of an administrative law judge or a judge from that agency's Board of Contract Appeals. *See* 24 CFR § 24.313 (1993). *See infra* note 222 & accompanying text. Officials involved in the process from most other

In *Klopfenstein* the debarred contractors also raised a constitutional attack urging that the debarment regulations are unconstitutional because they lack a "guarantee that an individual subject to debarment will receive a fair hearing before an impartial decision maker."[212] The debarred contractors asserted that the Supreme Court's holding in *Wong Yang Sung v. McGrath*[213] directs that agency debarment proceedings be conducted by administrative law judges.[214] The *Klopfenstein* court determined that *Wong Yang Sung* was inapplicable to the debarment proceedings in question. The court reasoned that *Wong Yang Sung* differed because the hearing in *Wong Yang Sung* had resulted in a denial of due process.[215] Unlike the regulations in *Wong Yang Sung*, which required the hearing officer to engage in investigative, prosecutorial, and adjudicative duties in deportation proceedings, the *Klopfenstein* court observed that under the debarment regulations "the debarring officer is not a member of the investigative branch of the agency. Furthermore, the regulations, on their face, do not merge the functions of prosecutor and decision-maker."[216] Additionally, the court determined that the FAR's debarment procedures "comport with the fundamental fairness requirements of due process" per the *Mathews v. Eldridge* balancing test, and that "the rationale of *Wong Yang Sung* has no application to the…debarment regulations."[217]

---

agencies do not prefer that level of formality or favor a change to require debarment matters to be conducted "on the record" for purposes of being subject to the APA's rules for formal adjudication.

[212] 930 F.2d at 742. They asserted that the regulations did not provide sufficient procedural safeguards "to protect [their] property and liberty interests against unwarranted infringement." *Id.*

[213] 339 U.S. 33 (1949). In *Wong Yang Sung*, INS regulations required that members of the agency's investigative branch conduct the agency's deportation hearings. *See id.* at 45. In addition, the regulations charged the hearing officer who presided over the case to "conduct the interrogation" of both the person to be deported and his witnesses. *Id.* at 46. Thus, the decisionmaker in a deportation case also served as an investigator for the agency and as a prosecutor during the proceedings. No statute required the agency to provide any kind of hearing, but one was required by due process. With respect to the type of hearing required, the Supreme Court held that the APA provisions should apply. Specifically, the Court determined that notwithstanding the lack of any statutory language triggering the formal adjudicative aspects of the APA, the words "required by statute" set forth in section 554(a) of the APA were intended to cover hearings required by *either* statute or constitutional due process. *See id.* at 50.

[214] 930 F.2d at 743.

[215] *See id.* at 743.

[216] *Id.*

[217] *Id.* at 743. The court reasoned that fundamental fairness "guarantees a fair hearing before an impartial trier of fact to persons facing…debarment proceedings." *Id.* The court determined that the impartial party need not be an administrative law judge as contemplated by the APA. *See also* ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 114 (1989) (discussing the Court's holding in *Wong Yang Sung*, but questioning whether *Wong Yang Sung* is consistent with today's more "variable" due process determinations given *Mathews v. Eldridge*).

VI. Variations on Uniformity

Notwithstanding the promulgation of government-wide debarment and suspension regulations, there is still some lack of uniformity from agency to agency on the implementation and application of the procedures. For example, the military departments and other agencies within the Defense Department have relatively informal procedures. Affected contractors present information and argument in opposition to a suspension or proposed debarment to the decisionmaker in an informal setting.[218] In appropriate cases, if the information in opposition to the proposed action raises a genuine dispute over the facts, the agency will proceed to a somewhat more formal fact-finding hearing.[219] The GSA follows informal procedures that are similar to those within the Department of Defense.[220] On the other hand, the EPA is more formal with requirements for cases to be argued before hearing officers, who make recommendations to the debarring official.[221] At the extreme, HUD provides even more formal procedures.[222] These examples are illustrative of some of the variations that exist between agencies despite the presence of a basic framework of uniformity. Indeed, there is a great deal of variation between agencies with respect to the officials employed to serve as debarring/suspending officials.[223] On the other hand, despite some differences in the nature of these individuals' job positions, they all tend to be high agency officials.[224]

---

[218] *See* 59 Fed. Reg. 27,662, 27,700-01 (May 27, 1994) (to be codified as Defense FAR Supplement (DFARS) Appendix H-103, 48 CFR Chapter 209, Appendix H-103). The agency's new hearing procedure describes the in-person presentation as "an informal meeting, nonadversarial in nature." *Id.* at H-103(b). The proceeding resembles a conference more than a hearing.

[219] *See id.* at H-104. Although more adversarial, the fact-finding proceeding is not subject to the Federal Rules of Evidence or the Federal Rules of Civil Procedure. *Id.* at H-104(d). The Defense Department's fact-finding procedures are described in more detail below. *See infra* notes 229-32 & accompanying text.

[220] *See* 48 CFR §§ 509.406-3, 509.407-3 (1993).

[221] *See* David M. Sims, *Suspension and Debarment: Potent Government Tools*, 25 SONREEL NEWS 1, 14 (Jan./Feb. 1994) (Mr. Sims is the Chief Hearing Officer for the agency); ABA PRACTITIONER'S GUIDE, *supra* note 5, at 92-93 (observing that the agency conducts hearings before hearing officers even in cases in which there are no material facts in dispute).

[222] The recent ABA monograph described the HUD procedures as "markedly different" from those of any other agency. *See id.* at 96. The agency has relatively formal rules of procedure set forth at 24 CFR §§ 26.1 - .25 (1993). In addition, HUD requires hearings before members of the agency's Board of Contract Appeals or other agency administrative law judges, whose decisions are final unless the agency or affected person pursues an internal appeal. *See id.* §§ 24.313, 24.314(c). This review is discretionary. *Id.* § 24.314(c). For a discussion of problems that have arisen in light of this discretionary review, see *supra* notes 170-82 & accompanying text. Interestingly, of all the agency officials who responded to my request for comments, only administrative law judges from within HUD sought the adoption of more formal procedures. Letter from Alan W. Heifetz, Chief Administrative Law Judge, HUD, to Brian D. Shannon 2 (April 15, 1994) (on file with author). Indeed, the HUD administrative law judges were of the view that the law should be changed to make debarment and suspension matters subject to "on the record" proceedings for purposes of triggering formal adjudication under the Administrative Procedure Act. Of course, this recommendation may be none too surprising given that administrative law judges may be more comfortable with procedures that are more trial-like in nature. In any event, all the remaining agency responses to my inquiries were opposed to the imposition of more formal procedures. Indeed, even the General Counsel of HUD has indicated that his agency is considering the revision of its suspension and debarment regulations to bring the agency's process more in line with other federal agencies. Letter from Nelson A. Díaz, General Counsel, HUD, to Brian D. Shannon 2-3 (Sep. 29, 1994) (on file with author).

Should there be greater uniformity? Although formerly more disparate, the major procuring agencies within the Department of Defense[225] have endeavored to become more uniform in their debarment and suspension practices over the last several years. For example, the Air Force and Navy used to process debarment and suspension cases through review boards comprised primarily of procurement officials. These boards made recommendations to a higher official in each agency for action.[226] In changes adopted to mirror more closely procedures within the Army and the DLA, the Air Force and Navy have eliminated their boards and have installed debarring officials in high level legal positions.[227]

---

[223] The Debarment and Suspension Committee of the ABA's Public Contract Law Section has compiled an extensive list of debarment/suspension officials for federal agencies as an appendix to the recently published ABA PRACTITIONER'S GUIDE. *See* ABA PRACTITIONER'S GUIDE, *supra* note 5, at Appendix F (the list is updated as of July 1994).

[224] Due process may require a decision by a high-level administrator. *Cf.* ATL, Inc. v. United States, 736 F.2d 677, 687 (Fed. Cir. 1984) (indicating that a four-star admiral clearly suffices). The regulations are also silent with respect to who should be the presiding official for the agency during a contractor's presentation of information and argument in opposition to the action. In most agencies, however, the affected party will have the opportunity to make a presentation in an in-person meeting with the debarring/suspending official. *See* ABA PRACTITIONER'S GUIDE, *supra* note 5, at 80. There are also other matters regarding the designation of an agency's decisionmaker that may require further scrutiny. Should, for example, a debarring official tasked with carrying out responsibilities under the FAR for procurement debarments also be in the chain of command for the agency's procurement decisions? The Air Force recently changed its debarring official from the Deputy Assistant Secretary for Acquisition to a newly created Assistant General Counsel position. *See* 59 Fed. Reg. 27,622, 27,668-69 (May 27, 1994) (to be codified at DFARS 9.403(1), 48 CFR § 209.403(1)). The agency made this decision, in part, to move the debarment/suspension power out of the direct chain of procurement decisionmaking. Is it inappropriate for the same official who has high-level responsibility over an agency's procurement program (or grant program) to also be the person to bar concerns from those programs? Such a dual role appears acceptable if one views a debarment or suspension decision strictly in terms of being one of many procurement (or grant-making) determinations that an agency regularly makes. Given the additional legal ramifications of a debarment or suspension, however, is such a determination merely another procurement (or grant-making) decision? Although likely not reaching the level of a due process concern, issues of basic fairness may suggest some level of separation of these functions.

[225] These include the Air Force, Army, Navy, and DLA.

[226] *See* Memorandum from Anthony H. Gamboa, Deputy General Counsel of the Army, to the Under Secretary of Defense (Acquisition), *in* 57 Fed. Cont. Rep. (BNA) 417, 418 (Mar. 9, 1992) [hereinafter "Gamboa Memo"] (although finding generally that the procedures were fairly uniform, identifying differences in approaches between the processes within the three military branches and the DLA).

[227] *Id.* at 418-19. The debarring official within the Navy is that agency's General Counsel, *see* DFARS 9.403(1), 48 CFR § 209.403(1) (1993), and for the Air Force the official is now the Assistant General Counsel for Contractor Responsibility, *see* 59 Fed. Reg. 27,622, 27,668-69 (May 27, 1994) (to be codified at DFARS 9.403(1), 48 CFR § 209.403(1)). Having one official tasked solely with considering

Additionally, in early 1992 the Under Secretary of Defense issued guidelines to encourage the defense agencies to follow more uniform procedures in their debarment and suspension activities.[228] Consistent with these 1992 guidelines, the Defense Department recently added an appendix to the agency's FAR supplement setting forth uniform procedures for all of its debarring and suspending officials.[229] This new appendix generally addresses notice requirements[230] and procedures for conducting fact-finding hearings.[231] Although

---

debarment and suspension matters has advantages over the previous board structure. As a former counsel to the Air Force Debarment & Suspension Review Board (from 1983-86), I can attest to the scheduling difficulties that were often present. With a board comprised of two senior procurement officials and a senior procurement attorney (all of whom had many different responsibilities), scheduling delays were not uncommon in attempting to process cases or conduct meetings or hearings with affected contractors. In addition to added efficiency, the changes should also make the services' debarring officials more accessible to affected contractors.

[228] *See Yockey Approves Guidelines for Uniform Suspension and Debarment Procedures*, 57 Fed. Cont. Rep. (BNA) 377 (Mar. 9, 1992) (discussing guidelines to provide more consistency between the agency's various debarment and suspension authorities).

[229] *See* 59 Fed. Reg. 27,662, 27,700-01 (May 27, 1994) (to be codified as DFARS Appendix H, 48 CFR Chapter 209, Appendix H). In addition to those for the Air Force, Army, Navy, and DLA, the Defense Department has an array of additional debarring and suspending officials for assorted defense agencies and overseas military commands. Appendix H would apply to them as well. *See id.* at H-100 (stating that the "appendix provides uniform debarment and suspension procedures to be followed by all debarring and suspending officials").

[230] Section H-101 provides that in general "[a] copy of the record which formed the basis for the decision by the debarring and suspending official will be made available to the contractor." *Id.* at H-101. If for some reason the agency withholds a portion of the record, the agency must inform the contractor "of what is withheld and the reasons for such withholding." *Id.* Previously, the agencies had differed in the information provided to contractors as part of a notice of action. *See* Gamboa Memo, *supra* note 226, at 418. *See also* ATL, Inc. v. United States, 736 F.2d 677, 685 (Fed. Cir. 1984) (contrasting the Navy's actions in providing a suspended contractor with only portions of the record upon which the suspension in that case was based, with those of the Air Force in an earlier case in which the Air Force had provided a suspended contractor with every bit of evidence that had been available to the Air Force at the time of its suspension).

[231] *See* 59 Fed. Reg. 27,662, 27,701 (May 27, 1994) (adding DFARS Appendix H-104, to be codified at 48 CFR Chapter 209, Appendix H-104). The FAR requires the conducting of a fact-finding hearing in any case in which a contractor's submission of information and argument in opposition to a proposed debarment raises a genuine dispute over material facts. *See* FAR 9.406-3(b)(2), 48 CFR § 9.406-3(b)(2) (1993) (provided that the action is not based on a conviction or civil judgment). Similarly, the FAR generally calls for a fact-finding hearing in a suspension case to consider any genuine dispute over the material facts if the case is not premised on an indictment and assuming that the contractor's initial submission in opposition generates a factual dispute. *See* FAR 9.407-3(b)(2), 48 CFR § 9.407-3(b)(2) (1993) (which also states that in a suspension case the agency may defer to DOJ advice to forego such a hearing if "substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced"). Other than a few basic hearing requirements such as the right to appear with counsel, submit documents, present witnesses, confront any person the agency might present, and have a transcribed record, the FAR does not provide much with regard to these fact-finding hearings. *See id.* §§ 9.406-3(b)(2)(i)-(ii); 9.407-3(b)(2)(i)-(ii). Instead, the FAR tasks agencies to establish necessary procedures to be "as informal as is practicable, consistent with principles of fundamental fairness." *Id.* §§ 9.406-3(b); 9.407-3(b). Although the various defense agencies had procedures in place for fact-finding proceedings, Appendix H represents an effort to create uniformity

calling for somewhat less formal procedures, this DFARS appendix sets forth a process generally consistent with that called for in the 1962 ACUS Temporary Conference recommendations.[232]

Should agencies throughout the government pursue further efforts, like those recently undertaken by the Department of Defense, to make debarment and suspension procedures even more uniform? Just because implementing procedures may vary in degree from one agency to another does not make one agency's program more fair or responsive than others. From a constitutional perspective, the *Mathews v. Eldridge* analysis requires the consideration of due process challenges on a case-by-case basis.[233] Indeed, the courts have largely upheld constitutional challenges to the procedures followed by agencies within the Department of Defense,[234] which are perhaps as informal as any of those used by other agencies. Due process does not require more formal procedures, and existing regulations allow agencies flexibility to develop and employ procedures

---

within the agency. Under the new rules, the debarring/suspending official will designate a fact-finder to conduct a hearing upon determining that a genuine dispute over material facts does exist (in debarment cases not involving convictions or civil judgments and suspension cases not based on indictments). 59 Fed. Reg. 27,662, 27,701 (May 27, 1994) (DFARS Appendix H-104(a), to be codified at 48 CFR Chapter 209, Appendix H-104(a)). The designated fact-finder will conduct a hearing and generate written findings of fact after determining the facts by a preponderance of the evidence. *Id.* § H-106. The debarring/suspending official will then make a decision to impose a debarment or continue a suspension "based upon the entire administrative record, including the findings of fact." *Id.* § H-106(c).

[232] The Temporary Conference recommended that affected parties be afforded "a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed issues of fact relevant to the debarment issue." *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 267 (Recommendations 29-1(a)). The FAR and implementing regulations such as Appendix H embrace the Temporary Conference's call for conducting separate fact-finding hearings only in those cases in which there are genuine issues of material fact. In addition, Appendix H requires an independent fact-finder. On the other hand, the Temporary Conference contemplated a hearing in such instances consistent with the requirements for formal adjudication under the APA. *See id.* at 281. Appendix H is not as formal. For example, the provisions for formal adjudication under the APA place strict limits on ex parte contacts. *See* 5 USC § 557(d) (1988). In contrast, Appendix H does not mention the potential problem of ex parte contacts. Despite its relative informality, however, Appendix H provides procedures that are far more trial-like than the procedures in place under the FAR for debarment and suspension matters in which the facts are not in dispute. Indeed, Appendix H should provide a fair framework for resolving disputed facts in those cases in which it applies.

Appendix H also differs from the Temporary Conference Report with regard to Section H-106's limitation on the fact-finder to determine disputed facts only (leaving the ultimate decision to debar or maintain a suspension in the hands of the debarring official). 59 Fed. Reg. 27,662, 27,701 (May 27, 1994) (DFARS Appendix H-106(b)-(c), to be codified at 48 CFR Chapter 209, Appendix H-106(b)-(c)). The Temporary Conference Report concluded, "we think one who decides should hear." TEMPORARY CONFERENCE REPORT, at 283. The limitation on the fact-finder under Appendix H appears sensible. By leaving the ultimate decision regarding whether to continue a pending action up to the debarring official, the regulations offer the potential for greater consistency in decisionmaking. The decisionmaking power remains vested in a single high-level official.

[233] *See* 424 U.S. 319, 334 (1976) (describing due process as flexible and not subject to fixed rules).

[234] *See, e.g.*, cases cited *supra* at note 169.

to meet their own respective needs. Further uniformity is generally not required.[235]

Despite the lack of a general need for greater uniformity, one additional topic is pertinent with regard to the nature of the decisionmakers involved in the process. The pertinent regulations for debarment and suspension contemplate two basic types of in-person hearings between an agency and an affected concern. In the procurement arena, for example, an affected contractor has the opportunity to make an in-person presentation to the agency within thirty days following receipt of the notice of action for either a suspension or a proposed debarment.[236] If the agency's action is premised on an indictment (for a suspension) or a conviction or civil judgment (for a proposed debarment), the regulations do not provide for any further hearing procedures. Similarly, if the contractor's submission of information in opposition to the action does not raise any material dispute over the facts, no further hearing procedures are warranted.[237] Indeed, a contractor is entitled to a further fact-finding proceeding only when the initial presentation raises a genuine dispute over the facts.[238] There is a gap in the regulations, however, in that they do not identify the type of official who should preside over such a fact-finding hearing. It would seem reasonable for the regulations to be amended to identify the type of decisionmaker to be employed for such fact-finding proceedings.[239] ACUS has previously taken the general

---

[235] One scenario is worth noting, however. If an entity has contracts or grants with multiple agencies and faces a possible debarment or suspension action, the decision as to which agency will pursue the matter likely will be significant to that entity. The affected concern may have an interest in being under the jurisdiction of an agency that affords greater procedural protections or, alternatively, to be before an agency that is more flexible and less formal. Of course, the affected entity may not have any say in the matter. On the other hand, these considerations may well encourage the concern to take the initiative in approaching a more favorable "forum" before one of the interested agencies commences action. *See* W. Jay DeVecchio & Devon Engel, *supra* note 26, at 75.

[236] *See* FAR 9.407-3(c)(5), 9.406-3(c)(4); 48 CFR §§ 9.407-3(c)(5), 9.406-3(c)(4) (1993).

[237] *See id.* §§ 9.407-3(c)(5-6), 9.406-3(b)(2).

[238] In the case of a suspension, the DOJ can advise that additional proceedings would jeopardize pending or contemplated criminal or civil proceedings as a potential block to further fact-finding proceedings even when there might be a genuine dispute over the facts. *Id.* § 9.407-3(c)(6).

[239] This assumes that the designated fact-finder is someone other than the debarring/suspending official. Even the new DFARS appendix, which spells out rules for conducting such fact-finding hearings, does not identify the type of official who will serve as the adjudicator. *See* 59 Fed. Reg. 27,662, 27,701 (May 27, 1994) (adding DFARS Appendix H-104, to be codified at 48 CFR Chapter 209, Appendix H-104); *see also supra* note 231 (discussing the agency's new rules). Appendix H-104 sensibly limits the designated fact-finder to determining the facts in dispute. The debarring/suspending official then retains jurisdiction to make the ultimate determination whether there are grounds to continue with the action in light of the facts.

Some agencies have designated fact-finders under their own rules. For example the Department of Energy's subpart to the FAR designates a three-member panel to conduct any fact-finding conferences. *See* 48 CFR § 1035.8(a) (1993). The EPA uses hearing officers for both initial proceedings and fact-finding hearings. *See* ABA PRACTITIONER'S GUIDE *supra* note 5, at 92. The Department of Agriculture has one additional twist. Under that agency's nonprocurement regulations, a debarred or suspended position that cases involving "imposition of sanctions with substantial economic effect" should be heard by administrative law judges.[240] That same standard may be appropriate with respect to actual fact-finding proceedings under the debarment and suspension rules.[241]

VII. Period of Debarment

FAR 9.406-4(a) provides broadly that a debarment "shall be for a period commensurate with the seriousness of the cause(s)."[242] That regulation states further, however, that, in general, a debarment "should not exceed 3 years...."[243] A contractor is entitled to be credited for any period of suspension that precedes a debarment.[244]

---

concern may appeal that determination to the agency's Office of Administrative Law Judges for review. *See* 7 CFR § 3017.515 (1994) (under the same rules there are a number of debarring/suspending officials dispersed across the agency's various programs).

[240] ACUS Recommendation 92-7, *The Federal Administrative Judiciary*, at I(A)(1)(c), 1992 ACUS 28, 38.

[241] Although there is gap in the regulations on this point, the problem may be more theoretical than real. Very few debarment or suspension cases actually involve disputes over the material facts. The majority of cases are premised on indictments or convictions for which the regulations do not call for further proceedings concerning the facts. Even in those cases in which the agency has developed the factual basis for proceeding, very few actions have tended to result in fact-finding hearings. For example, in FY1994, 96 percent of the Air Force's suspensions were based on indictments. *See* Cook Letter, *supra* note 84, at 4. In the five-year period between 1989-94, NASA processed 11 cases (involving 38 parties) all of which were based on indictments or convictions. Facsimile Transmission from Thomas J. Whelan, NASA Procurement Policy Division, to Brian D. Shannon (Sep. 14, 1994) (on file with author). The Army reported 468 suspensions and debarments in FY1992 and 383 suspensions and debarments in FY1993. Facsimile Transmission from Lt. Col. Thomas W. Rau, Procurement Fraud Division, Dept. of the Army, to Brian D. Shannon (Sep. 13, 1994) (on file with author). Although a majority of the Army's cases were based on indictments or convictions, the Army also imposed over 300 debarments during those two years that were based on evidence developed by the agency. *Id.* Nevertheless, in none of those cases did the contractor's presentation of information in opposition to the proposed action generate any dispute over the material facts. Accordingly, the agency conducted no further fact-finding proceedings. Similarly, in 1993 the DLA imposed a total of 449 debarments and suspensions. Of these, 356 were based on convictions or indictments, and the agency conducted no fact-finding proceedings in the other cases. Facsimile Transmission from Cherie Taylor, Office of the General Counsel, DLA, to Brian D. Shannon (Sep. 14, 1994) (on file with author). Even HUD, in which the current procedures are more formal than in other agencies, has indicated that a substantial majority of their cases are based on indictments or convictions. Letter from Georjan D. Overman, Trial Attorney, Office of General Counsel, HUD, to Brian D. Shannon (Oct. 6, 1994) (on file with author) (59 percent of cases filed beginning in 1990). Finally, the EPA uses hearing officers for both initial proceedings and fact-finding hearings. The agency has conducted approximately 6-10 fact-finding hearings per year over the last several years. Telephone Interview with Robert F. Meunier, Director, Suspension & Debarment Division, EPA (Sep. 16, 1994).

[242] FAR 9.406-4(a), 48 CFR § 9.406-4(a) (1993).

[243] *Id.* The subsection provides an exception "that debarment for violation of the provisions of the Drug-Free Workplace Act of 1988...may be for a period not to exceed 5 years." *Id.*

[244] *See id.* The nonprocurement regulations similarly require that debarments should generally not exceed three years. *See* 28 CFR § 67.320 (1993) (DOJ); 24 CFR § 24.320(a)(1) (1993) (HUD).

The three-year period had its origins in ACUS Recommendation 29-8 as part of the 1962 Temporary Conference proceedings and recommendations.[245] Prior to that time, the military departments generally pursued five-year debarments for fraud and other convictions.[246] The Temporary Conference recommended three years in large measure because (1) that was the maximum period Congress had employed for several statutory debarments and (2) it was the period most contracting agencies used.[247] The Temporary Conference's review committee concluded that "in any event our notions of fairness as well as the public interest in maximum competition for government contracts support the idea of a second chance after a reasonable debarment period. The Committee is not persuaded that this period should exceed three years."[248]

Even though three years is the presumptive period today, the regulations are flexible and allow shorter or longer debarments "commensurate with the seriousness of the cause(s)."[249] In addition, the debarring official can extend a debarment for an additional period "if that official determines that an extension is necessary to protect the government's interest."[250] An agency is not, however, to extend a debarment based solely on the same facts and circumstances that formed the basis of the initial debarment.[251]

---

[245] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 293-94. Recommendation 29-8 provided that "except as provided by statute or executive order, debarments should be for a reasonable, definitely stated period of time commensurate with the seriousness of the cause therefor, but not to exceed three years...." *Id.* FAR 9.406-4(a) and the parallel provision in the nonprocurement rules closely mirror the language contained in this recommendation.

[246] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 279-80, 294. The Defense Supply Agency had even sought an ability to impose indefinite debarments in certain cases (with periodic reconsideration). *Id.* at 294.

[247] *See id.* The report observed that the five-year debarments "at times appear[ed] to be motivated by punitive considerations." *Id.*

[248] *Id.*

[249] FAR 9.406-4(a), 48 CFR § 9.406-4(a)(1993). The nonprocurement regulations afford the debarring officials similar flexibility. *See, e.g.*, 28 CFR § 67.320 (1993).

[250] FAR 9.406-4(b), 48 CFR § 9.406-4(b)(1993). *Cf.* Facchiano Construction Co., Inc. v. Dep't of Labor, 987 F.2d 206 (3d Cir.), *cert. denied*, 114 S.Ct. 80 (1993). In *Facchiano Construction* the Department of Labor (DOL) debarred the company and certain individuals for three years throughout the federal government "for willful and aggravated violations of Davis-Bacon Related Acts." *Id.* at 213. The company challenged the debarment because HUD had previously debarred the concern from participation in HUD programs for 18 months based on the same underlying wrongdoing. *Id.* at 209. Facchiano Construction argued that DOL was precluded from pursuing the government-wide debarment under res judicata principles given the prior 18-month debarment from HUD programs. The court rejected the company's arguments, reasoning that HUD did not have authority to bar the company on a government-wide basis at the time in question. *Id.* at 211-12 (HUD now has the authority to issue debarments with government-wide effect. *See* 24 CFR § 24.200(a) (1993)). The court also determined that although the underlying wrongful conduct which had been the subject of the HUD proceeding was also in issue in the DOL case, "the two debarment proceedings arose from different statutes and different evidence." 987 F.2d at 212-13.

An agency also has the flexibility to reduce the period or extent of a debarment.[252] Indeed, the ACUS Temporary Conference recommendations in 1962 suggested "that debarments should be removed upon a showing of current responsibility."[253] If a contractor no longer lacks present responsibility, then the need for a full three-year debarment may have passed. To that end, the FAR allows the debarring official to reduce a debarment if the contractor demonstrates the basis for doing so.[254] In addition to being able to limit the duration of a

---

[251] *Id. Cf.* Wellham v. Cheney, 934 F.2d 305, 309 (11th Cir. 1991) (holding as a matter of law that a later conviction for matters giving rise to an initial debarment constitutes "a new fact or circumstance" under FAR 9.406-4(b) to support extending that debarment). In *Wellham*, the court strained to reason that because a conviction for fraud or false statements is a separate and distinct cause for debarment, an agency could consider the fact of the conviction as a new fact or circumstance justifying further debarment. *Id.* Although the court was a bit dubious and reluctant, and acknowledged that "the accuracy of the DLA's conclusions are debatable,...they are clearly not arbitrary or capricious." *Id.* at 310. As a general proposition, for an agency to debar a company for three years based on contracting improprieties bearing on the present responsibility of the firm, and then extend the debarment based solely on a conviction arising out of the exact same wrongdoing, would appear to be highly punitive in nature. In fairness to the agency in *Wellham*, however, the extension of the debarment was only for one additional year and was not based solely on the eventual conviction. Instead, the agency extended the debarment, in part, because the contractor had submitted false certificates of conformance in connection with two contracts that had not been the subject of the initial debarment. *See id.* at 308-09. The court reasoned that "[w]hatever the precise meaning of 48 CFR § 9.406-4(b), the DLA certainly acted reasonably in finding..." that the improprieties concerning the two additional contracts were not the same facts or circumstances underlying the initial debarment. *See id.* at 309.

Another issue involving the duration of exclusion from government programs arises under HUD's regulations. HUD has authorized certain lower level agency officials to impose suspension-like "limited denials of participation" that result in exclusions from specific HUD programs within a defined area for up to one year. *See* 24 CFR §§ 24.700-24.713 (1993). These agency officials can impose a limited denial of participation for some of the same reasons that could constitute grounds for debarment. *Id.* § 24.705. The regulations state that the imposition of a limited denial of participation does not effect the right of the agency to take subsequent suspension or debarment action. *Id.* § 24.710(b). Moreover, there is nothing in the regulations to indicate that a later debarment action should take into account the duration of any such limited denial of participation. The Chief Administrative Law Judge for HUD has questioned the fairness of this process. *See* Letter from Alan W. Heifetz, Chief Administrative Law Judge, HUD, to Brian D. Shannon 1 (April 15, 1994) (on file with author). Although the scope of a limited denial of participation is much narrower than that of a suspension or debarment, the regulations appear duplicative and could result in exclusions (at least in some programs) for longer than the presumptive three-year period.

[252] FAR 9.406-4(c), 48 CFR § 9.406-4(c)(1993).

[253] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 294 (Recommendation 29-8). The rationale for this part of the recommendation was that "[i]f new facts develop which show the original judgment was incorrect when made or is without continuing validity, there is probably no authority to continue the debarment...." *Id.*

[254] FAR 9.406-4(c), 48 CFR § 9.406-4(c)(1993). That section allows a contractor to provide "reasons such as—

> (1) Newly discovered material evidence;
>
> (2) Reversal of the conviction or civil judgment upon which the debarment was based;

debarment, the debarring official can also narrow the extent of a debarment to particular divisions, organizational elements, or products.[255]

Although the pertinent regulations create a presumptive limit on debarments of three years, debarring officials still have the flexibility to impose longer initial debarments if the facts warrant.[256] The danger exists, of course, that if the debarment period exceeds three years, then the agency may have crossed the line from trying to protect the government to administering punishment. Nonetheless, debarments in excess of three years are not unknown.[257] To avoid arbitrary

---

> (3) Bona fide change in ownership or management;
> (4) Elimination of other causes for which the debarment was imposed; or
> (5) Other reasons the debarring official deems appropriate."

Id.; see also 28 CFR § 67.320(c) (1993) (nonprocurement version). A contractor could also attempt to have the debarring official lift or limit a debarment by demonstrating satisfactory achievement of certain of the mitigating factors or remedial measures identified in FAR 9.406-1(a) even if those steps were not in place at the time of the initial debarment determination.

[255] FAR § 9.406-1(b), 48 CFR § 9.406-1(b) (1993); 28 CFR § 67.325(a) (1993). Another set of issues that has spurred litigation relating to the scope or extent of debarments and suspensions has related to the imputation of liability from individuals to corporations, and vice versa, and the extension of a debarment or suspension to affiliated persons or businesses. The regulations define "affiliates" in terms of direct or indirect control. The FAR provides that "[b]usiness concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both." FAR § 9.403, 48 CFR § 9.403 (1993). The nonprocurement regulations contain similar language. *See, e.g.*, 28 CFR § 67.105 (b) (1993). Both sets of regulations include certain indicia of control such as interlocking management or ownership, identity of interests among family members, and shared facilities and equipment. *See id.* (listing these and other indicia of control). Agencies must provide separate notices to any affiliate subject to action. *See, e.g.*, FAR 9.406-1(b), 48 CFR § 9.406-1(b) (1993). Agencies may also impute the wrongdoing of employees to corporate entities and vice versa. *See id.* § 9.405 (setting forth standards for imputing "fraudulent, criminal, or other seriously improper conduct").

The inclusion of standards for affiliate status and imputation of responsibility is responsive to concerns raised by the 1962 Temporary Conference. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 279. Nonetheless, litigation has still arisen concerning the scope and breadth of the regulatory standards. *See, e.g.*, Novicki v. Cook, 946 F.2d 938, 942-43 (D.C. Cir. 1991) (invalidating an agency decision to debar a corporation's president upon finding that the agency record was insufficient to show that the official had "reason to know" of misconduct by other corporate officials); Robinson v. Cheney, 876 F.2d 152, 160-61 (D.C. Cir. 1989) (upholding a debarment of a corporation despite the individual wrongdoer's transfer of certain ownership interests to a trust because the individual maintained some level of control); Caiola v. Carroll, 851 F.2d 395 (D.C. Cir. 1988) (finding arbitrary and capricious an agency's decision to debar certain corporate officials of a convicted corporation but not others). The litigation has mainly related to the contours of the existing regulations, however, and the present standards, as construed by the courts, provide a workable framework for addressing these matters.

[256] *See id.* § 9.406-4(a) (providing that generally debarment should not exceed three years); 28 CFR § 67.320 (a)(1) (1993) (providing same, but adding that agencies may impose a longer period for nonprocurement debarments "[w]here circumstances warrant").

[257] *See, e.g.*, Coccia v. Defense Logistics Agency, No. 89-6544, 1992 WL 345106 (E.D. Pa. Nov. 12, 1992). In *Coccia* the court declined to overturn a 15-year debarment although it had originally set aside the agency's debarment order based on a lack of support in the administrative record to justify the length of the debarment. *Id.* at *1. The court had initially remanded the case to the agency for a more detailed explanation of its rationale for imposing the 15-year debarment. *Id.* at *2. On remand, the agency

application of the debarment weapon and the perception that the sanction is being employed in a punitive manner, agencies should be very hesitant to go beyond the three-year period except in exceptional cases. To do otherwise would mock the requirement that debarment not be used as punishment.

VIII. Mitigating Factors

The debarment regulations contained in the FAR are permissive and not mandatory. The debarment official has discretion in imposing a debarment and "may, in the public interest, debar a contractor for any of the causes" set forth in the regulations.[258] Indeed, the FAR specifically provides that "[t]he existence of a cause for debarment...does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment determination."[259] This aspect of the FAR is consistent with the general policy that the sanctions of debarment and suspension "be imposed only in the public interest for the Government's protection and not for purposes of punishment."[260] To assure that governmental protection is warranted and to avoid punishment, mitigating factors and remedial measures are highly pertinent. Accordingly, the FAR now requires that the debarring official should consider relevant mitigating

---

held firm to its earlier decision to debar for 15 years, concluding that Coccia had corrupted the system "for a ten year period by interfering with the confidentiality of the bid process and giving secret price information to the contractors who bribed him." *Id.* at *3. In addition, Coccia had not appeared to understand or appreciate the impact his conduct had on the procurement system and instead blamed the system for his wrongdoing. *Id.* at 4. Indeed, even the court found Coccia's corruption of the system to be "reprehensible" and "characterized by repeated abuse of the Government procurement system which spanned a period of at least ten...years up until the time" of detection. *Id.* at *5. Accordingly, the court found the agency's decision to debar for 15 years to be rational and "based on relevant factors." *Id.* In her debarring decision, the debarring official had recognized that "[a]lthough a debarment generally is imposed for three years, there is no maximum period. The Government thus is free to impose longer periods in egregious circumstances that present an unusual threat to the Government's business interests. This is such a case." *Id.* at *4. The facts in *Coccia* do reveal that the situation leading to the lengthy debarment in that case was exceptional. To avoid eviscerating the three-year standard, however, agencies should endeavor not to let exceptions become the rule. Of course, even Mr. Coccia can avail himself of the ability under the FAR to present additional facts or new mitigating factors and remedial measures during the term of his debarment in an effort to have the period shortened. *See* FAR 9.406-4(c); 48 CFR § 9.406-4(c) (1993).

[258] FAR 9.406-1, 48 CFR § 9.406-1 (1993).

[259] *Id.* Similar language is included in the suspension regulations. *See id.* at § 9.407-1(b)(2). One attorney who responded to my request for comments identified as his "most pressing area of concern" the lack of criteria discussing when an agency should, or should not, suspend medium to large corporations based on potential violations of the law by employees. Letter from Marshall J. Doke, Jr., to Brian D. Shannon, March 10, 1994 (on file with author).

[260] FAR 9.402(b), 48 CFR § 9.402-b (1993). *See also* Roemer v. Hoffman, 419 F. Supp. 130, 131-32 (D.D.C. 1976) (observing that, notwithstanding a conviction, an agency should consider mitigating factors concerning present business risks).

factors and remedial measures, and since 1992 the regulation has even listed ten such factors.[261] In contrast to the FAR, the rules for nonprocurement debarments do not include this list of mitigating factors although the debarring officials are to take mitigating factors and remedial measures into account.[262] An agency's failure to consider pertinent mitigating factors and remedial measures could be grounds for a successful judicial challenge.[263]

---

[261] *See id.* § 9.406-1(a). The listed factors include the following:

> (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.
>
> (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.
>
> (3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
>
> (4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.
>
> (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.
>
> (6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.
>
> (7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.
>
> (8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.
>
> (9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.
>
> (10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

Id. The ten mitigating factors became effective in early 1992. *See* 56 Fed. Reg. 67,125, 67,129-30 (Dec. 27, 1991). Despite the listing of these factors, however, this section of the FAR also states that "[t]he existence or nonexistence of any mitigating factors or remedial measures...is not necessarily determinative of a contractor's present responsibility." *Id.* The contractor also has the burden of demonstrating the lack of need for debarment "to the satisfaction of the debarring official." *Id.*

[262] *See, e.g.*, 28 CFR § 67.300 (1993).

[263] *See, e.g.*, Silverman v. Dep't of Defense, 817 F. Supp. 846, 849 (S.D. Cal. 1993) (finding that the agency abused its discretion in not considering mitigating factors in debarring a contractor who had been convicted of misdemeanor conversion); Sellers v. Kemp, 749 F. Supp. 1001, 1009-10 (W.D. Mo. 1990) (although upholding debarment, finding an abuse of discretion by the agency Secretary's designee in ignoring mitigating factors and in not limiting the debarment period to less than three years). Notwithstanding *Silverman*, in which the agency did not adequately consider mitigating factors, a misdemeanor conviction can give rise to a three-year debarment notwithstanding alleged mitigating factors. *See* FAR 9.406-2(a); 48 CFR § 9.406-2(a) (1993); The Robinson Co. v. Dep't of the Army, No. W-91-CA-387, slip op. at 11-12 (W.D. Tex., Sep. 25, 1992) (despite allegations of mitigating factors, the court held it was not arbitrary for the agency to issue a debarment where the sole offender was the company's president and owner who had not cooperated in the investigation and denied full responsibility). *Cf.* Shane

The mitigating factors described in the procurement debarment rules have had an intriguing evolution over the last decade. In 1984, then Deputy Secretary of Defense Taft ordered interim changes to the agency's DFARS to require generally that contractors be debarred for more than a year in the case of any felony conviction, and that only the Secretary of Defense (or an Under Secretary) could approve a decision to debar for a year or less.[264] In addition, the so-called Taft rules also provided that "any mitigating factors... [could] only be considered in determining the period of debarment."[265] These changes in the rules provoked much criticism.[266] Subsequent to public comments and much outcry, in July 1985 the Defense Department amended the Taft rules to ameliorate their severity somewhat.[267] The agency modified the rules to provide that the period for debarments based on felony convictions should "generally be for more than one year," but that the agency could consider mitigating factors in making the debarment decision.[268] The revised rules cautioned, however, that "for any decision not to debar or to debar for one year or less, the mitigating factors must demonstrate clearly to the debarring official's complete satisfaction that the contractor has eliminated such circumstances [leading to the conviction] and has implemented remedial measures."[269]

In 1986 the Final Report of the President's Blue Ribbon Commission on Defense Management (known as the Packard Commission) discussed problems with the suspension and debarment practices within the Department of Defense.[270] In particular, the Packard Commission's final report took the view that the Defense Department may have departed from the FAR's direction that suspension and debarment be utilized strictly as protection against contractors lacking present responsibility.[271] Additionally, the Packard Commission was

---

Meat Co. v. Dep't of Defense, 800 F.2d 334, 338-39 (3d Cir. 1986) (reversing on abuse of discretion grounds a district court order that had reduced a debarment based on a conviction from three years to a year; the appeals court also found that the agency debarment official had considered all relevant mitigating factors); Agan v. Pierce, 576 F.Supp. 257, 261-62 (N.D. Ga. 1983) (upholding debarment based on guilty plea after rejecting contentions that agency had not given mitigating factors sufficient weight).

[264] *See* 50 Fed. Reg. 8121-22 (Feb. 28, 1985). The Secretary of Defense was not the usual debarring official for the military services or other defense agencies.

[265] *Id.* at 8122 (amending 48 CFR §209.406-1(d) (1985)).

[266] *See, e.g.,* Robert D. Wallick et. al, *supra* note 26, at 170.

[267] *See* 50 Fed. Reg. 28,209 (July 11, 1985).

[268] *See id.* (amending 48 CFR §§ 209.206-1, -4 (1985)).

[269] *Id.*

[270] A QUEST FOR EXCELLENCE, Final Report to the President by the President's Blue Ribbon Commission on Defense Management 101-11 (June 1986) [hereinafter "Packard Commission Report"].

[271] *See id.* at 102. Although the Packard Commission Report recognized that "suspension and debarment are indispensable tools in assuring that DoD not contract with those lacking present responsibility, they nevertheless are severe remedies that should be applied only in accordance with their stated purpose and legal standards." *Id.* In a letter that included various recommendations, the ABA Section on Public Contract Law had emphasized the need for the Packard Commission to focus on the

quite troubled that the Defense Department had been treating indictments as requiring automatic suspensions "without regard for corrective actions already taken."[272] As a possible response to these concerns, the Packard Commission observed that the process could be improved "in crucial respects" if the regulations were amended to include criteria for ascertaining when a contractor is presently responsible.[273] Accordingly, the final report offered criteria that the Packard Commission deemed pertinent and responsive.[274] Indeed, not long after the completion of the Packard Commission study, the Defense Department departed from the original Taft rules and delineated certain standards for mitigating factors and remedial measures.[275]

---

issue of present responsibility. *See* Myers Letter, *supra* note 193, at C-71.1-.2. Indeed, the Packard Commission appeared to draw heavily upon concerns expressed in the Section on Public Contract Law letter such as, "the potential effects of suspension and debarment are so severe that this power must be properly circumscribed. The government should impose suspension and debarment only on contractors who are *not presently responsible.*" *Id.* at 71.1 (emphasis in original). On the other hand, the Packard Commission did not appear to embrace another proposal of the Section on Public Contract Law to establish a centralized authority within the Defense Department to consider all suspension and debarment cases. *See id.* at C-71.3. Instead, the Packard Commission recommended greater uniformity in the various departments' procedures. Packard Commission Report, *supra* note 270, at 109.

[272] *Id.* at 102.

[273] *Id.* at 105.

[274] The recommended criteria included:

> - The nature of integrity programs, if any, currently being implemented by the contractor. The debarring/suspending authority should be particularly interested in the extent of the contractor's affirmative efforts to implement ethical standards of conduct that address contract performance and systems of internal controls to monitor compliance with those standards.
> - The contractor's reputation for probity on recent procurements with DoD and other federal agencies.
> - The reputation of the contractor's management and directors in recent circumstances as persons of good character and integrity.
> - The extent to which misconduct is symptomatic of basic systemic problems within the corporation as opposed to isolated, aberrational corporate behavior.
> - The nature and extent of voluntary disclosure and cooperation offered by the contractor in identifying and investigating the misconduct.
> - The sufficiency of remedial measures taken to eliminate the causes of the misconduct.

Id. at 106.

[275] *See* 52 Fed. Reg. 34,386 (Sep. 11, 1987) (adding mitigating factors that were codified at DFARS 9.406-1(e), 48 CFR § 209.406-1(e) (later repealed). And, as discussed above, these mitigating factors became a part of the FAR in 1992. *See supra* note 261 & accompanying text. Somewhat contemporaneously, the Defense Department repealed its own list of mitigating factors. *See* 56 Fed. Reg. 36,280 (July 31, 1991) (deleting the Defense Department mitigation factors "because of the move to FAR"). Finally, the Defense Department removed the last vestiges of the Taft rules in 1992. *See* 57 Fed. Reg. 14,988, 14992 (April 23, 1992). This final change was largely as a result of Congress' forbidding any further implementation of the original Taft rules. *See* 1992 Department of Defense Appropriations Act, Pub. L. No. 102-172, § 8110, 105 Stat. 1200 (1991).

The Defense Department's earlier insistence on a presumptive one-year debarment under the Taft rules was clearly at odds with the FAR's direction that agencies impose debarment only to protect the government "and not for purposes of punishment."[276] The agency's retreat from automatic debarments with presumptive "sentencing" to the consideration and analysis of published mitigating factors was an appropriate step. It would be highly appropriate to extend these mitigating factors to the nonprocurement debarment and suspension rules.

The FAR's suspension regulations similarly direct that the existence of a cause for suspension does not mean that an agency must suspend the contractor. Instead, the suspending official is to "consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures or mitigating factors" like those set forth in the debarment rules.[277] The suspension regulations also place the burden on the contractor to act promptly in bringing evidence of any remedial measures or mitigating factors to the agency's attention when it has reason to believe that a cause for suspension may exist.[278] Unlike the case for a debarment, if an agency is considering suspension, the agency need not provide prior notice to the contractor. Nonetheless, a contractor may well be aware of the existence of causes that could precipitate a suspension (such as an ongoing criminal investigation or the return of an indictment). In that situation, it may be incumbent upon the contractor to take immediate remedial measures and promptly approach the procuring agency in an effort to head off a suspension.[279] Like for debarment, the courts could intervene in a suspension case on behalf of a contractor if an agency fails to take mitigating factors or remedial measures into account.[280]

---

[276] FAR 9.402(b), 48 CFR § 9.402(b) (1993). *See* Robert D. Wallick et. al, *supra* note 26, at 172-73; Packard Commission Report, *supra* note 270, at 102-03. Others have also expressed general doubt about whether agencies actually have followed the spirit of the distinction between protection and punishment in practice. *See, e.g.*, Robert S. Bennett & Alan Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 PUB. CONT. L.J. 30, 33-34 (1986) (commenting on remarks by former Secretary of Defense Weinberger in a television interview that an indictment of a government contractor requires an "automatic suspension"). Punishment of high-profile contractors may have political appeal for appointed agency officials but still does not comport with the applicable regulations and policies underlying the debarment tool. *See* Brian D. Shannon, *supra* note 6, at 30 n.144.

[277] FAR 9.407-1(b)(2), 48 CFR § 407-1(b)(2) (1993).

[278] *See id.* In addition, the newly added Appendix H to the DFARS specifically adds, "A contractor who becomes aware of a pending indictment or allegations of wrongdoing that the contractor believes may lead to suspension or debarment action may contact the debarring and suspending official or designee to provide information as to the contractor's present responsibility." 59 Fed. Reg. 27,662, 27,701 (May 27, 1994) (adding DFARS Appendix H-102(a), to be codified at 48 CFR Chapter 209, Appendix H-102(a)).

[279] *Cf.* Benjamin B. Klubes, *The Department of Defense Voluntary Disclosure Program*, 19 PUB. CONT. L.J. 525 (1990) (describing possible benefits of the agency's voluntary disclosure program).

[280] *See, e.g.*, Resource Applications Inc. v. EPA, No. 93-2525 RL (D.D.C., Jan. 11, 1994), *cited in EPA Contractor Wins Preliminary Injunction Enjoining Suspension Imposed After Indictment*, 61 Fed.

Two years ago the former Under Secretary of Defense for Acquisition stated that he was "concerned that contractors may not be aware that they are being considered for suspension."[281] Although recognizing that the FAR does not require any pre-suspension notice to contractors, the Under Secretary instructed,

> When appropriate prior to the suspension, I want companies to be informed that we have extremely serious concerns with their conduct, that their suspension is imminent and that they may contact the suspension official, or...designee, if they have any information to offer on their behalf.[282]

This suggestion, or requirement, that the Defense agencies employ some form of "shock and alarm" letter is an interesting development, and certainly exceeds the process that is Constitutionally mandated.[283] Given that the regulations do not require an automatic suspension even when grounds for suspension exist, agencies certainly have the flexibility to take such a preliminary step. What the Under Secretary meant by "[w]hen appropriate" remains to be

---

Cont. Rep. (BNA) 115 (Jan. 24, 1994) (granting a preliminary injunction against an EPA suspension based on an indictment where the agency did not consider remedial measures and mitigating factors prior to issuing the suspension). The case later became moot when the contractor was acquitted on the underlying criminal charges. *See EPA Firm Acquitted on False Claims Charges, Continues Effort to Have Suspension Lifted*, 61 Fed. Cont. Rep. (BNA) 310 (Mar. 7, 1994) (observing that agency perceived the matter as moot given the acquittal). *See also* ABA PRACTITIONER'S GUIDE *supra* note 5, at 156 (describing the company's various remedial measures, the relatively small dollar value of the wrongdoing, and the lack of management knowledge of wrongdoing).

One attorney from private practice who provided comments to me suggested that there should be some general criteria discussing the circumstances in which there should, or should not, be a suspension even in light of an indictment or other reasonable certainty that a crime may have been committed. Letter from Marshall J. Doke, Jr., to Brian D. Shannon, March 10, 1994 (on file with author). Specifically, Mr. Doke suggested that the regulations be amended to contain procedures that would encourage agencies not to suspend in return for commitments of cooperation from the affected concern. *Id.* at 3. I am not persuaded that the FAR needs additional changes in this area at this time. The addition of the list of mitigating factors to both versions of the debarment and suspension procedures should provide a helpful baseline of consideration for the deciding officials. Existing voluntary disclosure programs also play a role in limiting cooperating entities' exposure. *See* ABA PRACTITIONER'S GUIDE, *supra* note 5, at 108-30 (describing various voluntary disclosure programs); Boese, *supra* note 26, at 12 (observing that as of Jan. 1, 1993, only 1 out of 118 defense contractors who had come forward under the agency's voluntary disclosure program had been debarred). Moreover, an agency's complete disregard of the types of mitigating factors and remedial measures identified in the FAR can result in judicial correction. For purposes of both consistency and fairness, however, there should be amendments to the nonprocurement rules to add a similar list of mitigating factors and remedial measures. Additionally, those agencies that do not have voluntary disclosure programs in place should endeavor to do so.

[281] *See* Yockey Memo, *supra* note 91.

[282] *Id.*

[283] Intriguingly, the memorandum also suggests that "[t]his is not a change to existing policy or an expansion of contractors' rights, but merely an enhanced opportunity for DoD to consider all available information before making a decision which will affect a company's future business dealings with the government." *Id.*

seen, however.[284] Ironically, the Packard Commission had suggested the government's use of a "shock and alarm" practice in suspension cases several years earlier.[285]

The presence or absence of mitigating factors is also tied to concerns about disparities in treatment by government agencies between large and small contractors. Small contractors have long complained that they are the subject of more debarment and suspension actions than are larger entities. Of course, larger concerns may be in a better position to incorporate the mitigating factors identified in the regulations. A company with many employees in multiple divisions may be in a much better position to "prune" away wrongdoers and implement remedial measures than would a very small business.[286] With the small contractor, those persons involved in the fraud or other grounds underlying the debarment or suspension may also be key individuals in the operation of the concern. Even the small contractor can engage in remedial measures and attempt to mitigate the impact of prior problems, however.[287]

In sum, the addition of a specific list of mitigating factors and remedial measures to the FAR has been a positive step in assuring that agencies impose debarment and suspension only to protect the government and not for punishment. A similar list should be added to the nonprocurement rules. One other possibility for positive change with respect to both sets of debarment/suspension procedures could be the development of a list of

---

[284] One official familiar with the debarment and suspension process within the Department of Defense indicated privately that the defense agencies had construed the Under Secretary's term "when appropriate" as being fairly narrow. Moreover, in cases of indictments or prolonged criminal investigations, the affected contractors should be none too surprised by the prospect of impending suspension actions.

[285] The Packard Commission suggested that the "practice of 'automatic' suspension of contractors following indictment on contract fraud...be reconsidered by DoD with a view that it be more discriminating and take into account all circumstances of a particular situation." Packard Commission Report, *supra* note 270, at 107. Although the Final Report spoke approvingly of the use of "shock and alarm" letters instead of immediate suspensions, the Packard Commission offered no other concrete recommendations in this regard. In contrast, the ABA Section on Public Contract Law had proposed a rules change to the Packard Commission that would have precluded the issuance of a suspension in the absence of a prior agency hearing except upon a showing by the government of irreparable harm. *See* Myers Letter, *supra* note 193, at C-71.4. The Under Secretary's memorandum certainly does not go that far, but it is consistent with the suggestion contained in the Packard Commission Report.

[286] *See* Boese, *supra* note 26, at 11 (discussing the impact of company size).

[287] For example, an official of the DLA once stated, "Contractors must recognize that no one individual is indispensable. Even owners and chief operators of a small business can be replaced by a soundly constructed trust agreement and competent trustee." Karl W. Kabeiseman, *Fraud in Defense Contracting: Debarment and Suspension as Administrative Remedies*, in FRAUD IN GOVERNMENT CONTRACTING 121, 131 (1985). *Cf.* Robinson v. Cheney, 876 F.2d 152, 161 (D.C. Cir. 1989) (holding that the continuation of a debarment action was proper notwithstanding the business owner's transfer of ownership to a trust because the owner had retained both the right to receive income and a reversionary interest).

"aggravating" factors. Such factors could offer guidance to both agency officials and affected concerns with respect to either (1) the need for suspension or debarment or (2) the duration of a debarment.[288]

IX. Statutory Debarments

In contrast to the efforts in the administrative context to provide flexible limits on debarment periods with a general cap of three years, recent statutory enactments either provide mandatory, fixed periods of debarment or call for debarments in excess of three years. These mandatory or extended debarment statutes are inconsistent with a general policy of imposing debarment or suspension primarily to protect the government and are more akin to additional penal sanctions. Recall that in the administrative context, agencies are not to use debarments and suspensions as punishment.[289]

Congress undoubtedly has the constitutional authority to authorize the imposition of debarments as a form of punishment. Indeed, the Supreme Court has previously upheld the delegation to agencies of the power to assess administrative civil penalties.[290] Congress, however, has generally not enacted debarment statutes that are described as being strictly punitive per se.[291] On the other hand, congressional activity in this area over the last several years has reflected a trend toward more mandatory types of debarments and debarment periods that exceed three years. If not expressly punitive, the legislation reflects a movement toward de facto punishment.

A. Early Examples

Several statutes have long provided for debarment for particular contractual improprieties. The first such statute was the Buy American Act.[292] That act generally requires federal construction contractors to use products and materials manufactured in the United States.[293] The statute specifically precludes the award of any new "contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere" to a violator of the act for a three-year period.[294] Although the statute, by its terms, only mandates debarment for the prescriptive period from certain construction contracts, a conviction for violation of the statute could also constitute grounds for debarment from all federal contracting as "a criminal offense in connection with...performing a public contract or subcontract."[295] In theory, an agency could limit a debarment for violation of the act to the specific types of contracts identified in the statute, provided that the agency was satisfied with the contractor's mitigating factors and remedial measures, if any.[296]

---

[288] The debarring official for the Air Force has suggested the use of such a list of aggravating factors to serve as a balance to the current mitigating factors. *See* Cook Letter, *supra* note 84, at 3 (Ms. Cook's comments reflected her own views and were not necessarily official positions of the Air Force).

[289] *See, e.g.*, FAR 9.402(b); 48 CFR § 9.402(b) (1993).

[290] *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (upholding a statute authorizing an agency to impose administrative civil penalties).

[291] Compare, however, the discussion below of certain statutes in which Congress has prescribed automatic or extended debarments for violations of the terms of those statutes.

[292] 41 USC §§ 10a-10d (1988 & Supp. IV 1992) (this statute was first enacted in 1933).

[293] *Id.* § 10b(a).

In addition to the Buy American Act, other statutes have also long contained specific debarment provisions. For example, several labor standards acts such as the Davis-Bacon Act (and related acts),[297] the Walsh-Healey Act,[298] the Contract Work Hours and Safety Standards Act,[299] and the Service Contract Act of 1965,[300] all contain debarment requirements. Aside from these labor statutes, certain environmental protection acts such as the Clean Air Act and the Clean Water Act have included debarment provisions covering persons convicted of violations of those statutes at least as to contracts to be performed at the facilities at which the improprieties arose.[301]

---

[294] *Id.* § 10b(b).

[295] FAR 9.406-2(a)(1); 48 CFR § 9.406-2(a)(1) (1993). A predecessor procurement regulation somewhat redundantly included a willful violation of the Buy American Act as a specific cause for debarment. *See* ABA PRACTITIONER'S GUIDE, *supra* note 5, at 8 & n.9.

[296] For a discussion of mitigating factors, see *supra* notes 258-88 & accompanying text.

[297] 40 USC §§ 276a to a-7 (1988). The statute requires federal construction contractors to pay certain wage rates set by the Secretary of Labor. *Id.* § 276a. The debarment provision of the Davis-Bacon Act is set forth in § 276a-2(a), and it mandates a three-year debarment for violators. *Id.* § 276a-2(a). The Secretary of Labor also has responsibility to set wage rates with respect to some 60 other statutes. *See* 29 CFR § 5.1 (1993). Correspondingly, the Labor Department regulations provide for a three-year period of ineligibility for any contractor found by the agency to have violated the wage standards of these statutes. *See id.* § 5.12. For cases arising under the Davis-Bacon Act, itself, the agency refers its findings to the Comptroller General. *Id.* § 5.12(a)(2).

[298] 41 USC §§ 35-45 (1988). The debarment provision is set forth in § 37, and it requires a three-year debarment for violations of the provisions of the act (relating to certain wage and hour requirements and certain working conditions), "[u]nless the Secretary of Labor otherwise recommends...." *Id.* § 37.

[299] 40 USC §§ 327-33 (1988 & Supp. IV 1992). That act includes a debarment provision that requires the Secretary of Labor to debar for three years contractors engaged in "repeated willful or grossly negligent violations of the Act" by allowing employees in federal construction projects to work in unsanitary, hazardous, or dangerous work surroundings. *Id.* §§ 333(d)(1)-(2). The act does authorize the Secretary to lift a debarment at a point less than the full three years upon being "satisfied that a contractor or subcontractor whose name he has transmitted to the Comptroller General [as being debarred] will thereafter comply responsibly with the requirements" of the pertinent portions of the Act. *Id.* § 333(d)(2).

[300] 41 USC §§ 351-58 (1988). This statute covers wages, fringe benefits, and working conditions for most federal service contracts. *See id.* § 351(a). Section 354 directs the Secretary of Labor to debar violators of the Act (on a government-wide basis) for three years "[u]nless the Secretary otherwise recommends because of unusual circumstances...." *Id.* § 354(a).

[301] *See* 42 USC § 7606 (1988 & Supp. IV 1992); 33 USC § 1368 (1988). A listing under these statutes would not necessarily be as broad as a debarment from all federal contracting given the statutes' ties to the sites of the violations. This program has been further implemented through Executive Order

B. More Recent Enactments

In more recent years, Congress has begun aggressively adding new statutory debarment provisions. For example, with respect to defense procurement fraud, Congress has now barred individuals convicted of fraud or any other felony arising out of Department of Defense contracts from working on most defense contracts for at least five years.[302] The period of exclusion is mandatory unless the Secretary of Defense determines that a waiver is necessary "in the interest of national security."[303] This exclusion appears both redundant and unduly punitive. The FAR already authorizes debarment of an individual convicted of fraud or other offenses related to procurement contracts.[304] Moreover, under the FAR any such debarment would be permissive, generally limited to three years, and theoretically susceptible to limitation based on a satisfactory showing of mitigating factors.[305]

11,738, 33 Fed. Reg. 25,161 (Sep. 10, 1973), and EPA regulations. 40 CFR § 15 (1993). For a detailed discussion of the EPA's contractor listing program under these statutes, see W. Jay DeVecchio & Devon Engel, *supra* note 26, at 57-65. *See also* ABA PRACTITIONER'S GUIDE, *supra* note 5, at 90, 94-96 (discussing same).

[302] 10 USC § 2408 (1988 & Supp. V. 1993). Specifically, any such individual is barred from the following:

> (A) Working in a management or supervisory capacity on any defense contract or any first tier subcontract of a defense contract.
>
> (B) Serving on the board of directors of any defense contractor or any subcontractor awarded a contract directly by a defense contractor.
>
> (C) Serving as a consultant to any defense contractor or any subcontractor awarded a contract directly by a defense contractor.
>
> (D) Being involved in any other way, as determined under regulations prescribed by the Secretary of Defense, with a defense contract or first tier subcontract of a defense contract.

Id. § 2408(a)(1). The statute also includes a criminal sanction requiring that any defense contractor or subcontractor be subject to a criminal penalty of up to $500,000 if convicted of knowingly (1) employing an individual under this prohibition, or (2) allowing the barred individual to sit on the contractor's board of directors. *Id.* § 2408(b).

[303] *Id.* § 2408(a)(3). That subsection also mandates that the Secretary provide a report to Congress justifying any such waiver. *Id.*

[304] *See* FAR 9.406-2(a); 48 CFR § 9.406-2(a) (1993). In addition, because of concerns about possibly being considered an "affiliate" of a debarred individual or having that individual's lack of responsibility taint a firm's perceived responsibility, most responsible contractors would be reticent to employ a debarred individual in one of the capacities identified in the statute even in the absence of the criminal sanctions contained therein. *See* FAR 9.403, 9.406-5(a); 48 CFR §§ 9.403, 9.406-5(a) (1993) (defining "affiliate" and describing the possible imputation of an individual's conduct to a company).

[305] *See id.* §§ 9.406-1(a), 9.406-4. Of course, an individual convicted of procurement fraud may be unable to meet many of the mitigating factors and remedial measures identified in the FAR. Nonetheless, the virtually absolute five-year prohibitions set forth in 10 USC § 2408 are clearly punitive and inconsistent with more flexible efforts to assure present contractor responsibility. (For a discussion of the FAR's mitigating factors, see *supra* notes 258-88 & accompanying text). A section of the recent procurement streamlining legislation removes the application of the statute to contracts under the revised

Other recent Congressional enactments have also included specific debarment provisions. For example, the Drug-Free Workplace Act of 1988 requires most federal contractors and grantees to maintain drug-free workplaces.[306] The statute includes requirements for debarments from obtaining contracts and grants for violations of the statute, with a presumptive debarment period of five years.[307] Similarly, the Customs and Trade Act of 1990[308] permits the heads of appropriate agencies to debar violators of that statute from obtaining new contracts for purchasing unprocessed timber from federal lands for up to five years.[309] Another statute requires the Secretary of Defense to make a debarment determination within 90 days following a person's conviction "of intentionally affixing a label bearing a 'Made in America' inscription to any product sold or shipped to the United States that is not made in America."[310] Although this statute does not mandate a debarment, if the Secretary opts not to debar, the Secretary must provide a report to Congress.[311] This reporting requirement no doubt creates strong pressure on the Secretary to take debarment action.

With respect to nonprocurement programs, a section of the current Social Security legislation provides an extensive debarment requirement.[312] That act includes both mandatory and permissive "exclusions" from participation as a provider in the Medicare program or state health care programs because of a conviction for certain offenses or other delineated causes.[313] Moreover, in

---

simplified acquisition threshold ($100,000). *See* H.R. REP. NO. 712, 103d Cong., 2d Sess., § 4102(g), 140 CONG. REC. H8879, H8905 (Aug. 21, 1994) (to be codified as 10 USC § 2408(a)(4)).

[306] 41 USC §§ 701-07 (1988).

[307] *Id.* §§ 701(b), 702(b). Although the statute does not mandate a five-year period, that is the period set forth.

[308] 16 USC § 620 to 620j (Supp. V 1993). The statute generally forbids export of timber originating on federal lands. *Id.* § 620a(a).

[309] *Id.* § 620d(d). The statute also permits the pertinent agencies to cancel pending contracts with violators of the statute.

[310] 10 USC § 2410f(a) (Supp. V 1993). *See also* Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 202, 106 Stat. 4220 (1992) (requiring an amendment to the FAR to identify a violation of the "Made in America" label rules as a specific ground for debarment). Section 201 of that act also required an amendment to the FAR to identify the commission of certain unfair trade practices as yet another basis for debarment. *Id.* § 201.

[311] 10 USC § 2410f(a). The Defense Department recently deleted a DFARS regulation that specified a period of debarment for violators of the "Made in America" label statute "because the statutory mandate to specify the period of debarment was not continued in the Fiscal Year 1994 Defense Appropriations Act." 59 Fed. Reg. 27,622, 27,633 (May 27, 1994) (repealing the regulation formerly codified at DFARS 9.406-4, 48 CFR § 209.406-4).

[312] *See* 42 USC § 1320a-7 (1988 & Supp. IV 1992).

[313] The mandatory exclusions are for convictions of program-related crimes or patient abuse and must last for at least five years. *See id.* §§ 1320a-7(a), (c)(3)(A). The permissive exclusions are premised on a variety of convictions or other specified causes. *Id.* § 1320a-7(b). With regard to certain violations, Congress has required the agency to conduct a hearing before an administrative law judge prior to the imposition of a permissive exclusion. *See id.* § 1320a-7(f)(2). The Department of Health and Human Services [HHS] has observed that specialized procedures such as those set forth in the Medicare exclusion

addition to the enactments delineated above, there are still more recent statutory debarment provisions.[314]

C. Punishment or Protection?

In addition to recommending a cap of three years for debarments, over three decades ago the ACUS Temporary Conference took a stand against nondiscretionary statutory debarments. After examining the then-existing statutory debarments, the Temporary Conference recommended that Congress amend "the Buy American Act and the Davis-Bacon Acts to remove the absolute debarment penalties of these statutes and to authorize administrative discretion in imposing these statutory debarments with regard to the scope and period" to conform with other recommendations.[315] In addition, the Temporary Conference spoke approvingly regarding the presence of such discretion under the Walsh Healey Act.[316]

---

statutes may result in conflicts between the government-wide debarment procedures and the specific procedural provisions contained in a statutory debarment scheme. *See* Letter from Thomas E. Herrmann, Chief of Litigation and Sanctions, HHS, to Nancy Miller, Staff Liaison, ACUS 2 (Nov. 18, 1994) (on file with ACUS). For example, if an agency excludes a party from some government grant or contract by honoring another agency's debarment under the government-wide rules, the affected party may have grounds to complain if the agency in question is required to follow particular procedures under a mandatory debarment or exclusion statute. The affected party would urge that the agency had to follow the statute's procedures before making an exclusion decision and could not simply give reciprocal effect to the regulation-based debarment. An issue of this type is currently the subject of litigation involving the Office of Personnel Management pending before the Court of Appeals for the Federal Circuit (*Chertkov v. OPM*). This potential for conflict between the government-wide debarment rules and certain statutory provisions represents yet another problem with the proliferation of recent mandatory debarment schemes. Indeed, this issue and others raised by HHS (such as the rationale for excluding a bar on future federal employment from the effects of a non-procurement debarment) may merit further inquiry and research, but are otherwise beyond the scope of the present study.

[314] *See, e.g.*, 21 USC §§ 335a(a)-(c) (Supp. IV 1992) (providing for mandatory and permissive debarments from submitting certain drug applications for violations of requirements relating to the drug approval process; the debarment periods range from 1-10 years, but can be permanent in the case of a repeat violation). *Cf.* 20 USC § 954(l) (Supp. IV 1992) (precluding artists from receiving further grants from the National Endowment for the Arts if agency financial assistance is used for projects determined to be obscene; no further grants may be issued until the amount of the "violating" grant is repaid); 12 USC § 93 (Supp. V 1993) (providing for the forfeiture of bank franchises for violations of certain money laundering offenses (in a process similar to debarment); also includes mitigating factors comparable to those set forth in the FAR). For a more detailed discussion of these statutes, see ABA PRACTITIONER'S GUIDE, *supra* note 5, at 44-51.

[315] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 295 (Recommendations 29-9).

[316] *Id.* The Report stated, "Congress...conferred such discretion on the Secretary of Labor with regard to debarments under the Walsh Healey Act, and the Committee believes the same considerations support amendment of the Buy American and Davis-Bacon Acts." *Id.* Interestingly, the Report observed that the review committee had received no objections to this particular recommendation. As an historical note, notwithstanding the recommendation, the Buy American Act and the Davis-Bacon Act still include mandatory debarment language. *See* 41 USC §§ 10b(b) (1988 & Supp. IV 1992); 40 USC § 276a-2(a) (1988).

In his mid-1970's review of the debarment and suspension process for ACUS, Professor Steadman took note of the general lack of Congressional activity in the debarment and suspension field at that time.[317] He expressed "wonder...that Congress has not enacted more statutes expressly authorizing debarment to further desired social or economic goals."[318] With decided insight, Mr. Steadman also observed that "[g]iven the potential of the leverage, the Clean Air and Water Pollution Control Act amendments may presage things to come."[319]

As detailed above, Congress has certainly become more active in passing legislation to sanction or require debarments or exclusions from government programs in a variety of contexts. That Congress has authority to pursue social or economic goals through penal debarment enactments is subject to little doubt.[320] On the other hand, the mandating of debarments for stated periods clearly crosses the line from being purely protective of governmental interests to becoming a form of punishment.[321] That type of statute eliminates an agency's ability to be flexible and limit or lift a debarment upon satisfactory proof of mitigating factors or remedial measures. Certainly, some of the statutes identified in this section do not mandate debarment and leave some discretion in the hands of the administrators. On the other hand, many of these same statutes call for debarments for specific violations to be as long as five years or longer. If a debarment is to be a forecast of a period of presumed nonresponsibility because of past wrongdoing, why five years for a growing array of statutory violations, but a presumption of three years for other convictions and improprieties in the administrative realm?[322] Moreover, Congressional identification of violations of particular statutory provisions as constituting grounds for debarment appears both overtly political and redundant in nature. Under the regulations an agency may already debar a contractor based on broad grounds such as a conviction for fraud or a criminal offense in connection with a federal contract; commission of an offense such as theft, bribery, or making false statements; other offenses indicating a lack of business integrity or honesty that seriously impact on the contractor's present responsibility; or any other serious cause reflecting on the contractor's present responsibility.[323] Why, then, should separate statutes list as causes for debarment violations of matters such as "Made in America" rules or Drug-Free Workplace limitations?

---

[317] *See* John M. Steadman, *supra* note 8, at 801-02. That report identified the then-existing debarment statutes as including the various labor standards acts described above, the Buy American Act, and the early 1970's environmental statutes. *Id.* at 801.

[318] *Id.* at 802.

[319] *Id.*

[320] The former chair of the ABA's Section on Public Contract Law summarized this issue several years ago in explaining why suspension and debarment should involve a focus on present responsibility, not punishment:

> If Congress desires to create such a penalty, namely, a period of time during which a contractor is to be precluded from doing business with the government as a punishment for past offenses, it may do so; however, any such punishment must be circumscribed with the same kind of protections which are traditionally available when the government seeks punishment for *past* offenses.

Myers Letter, *supra* note 193, at C-71.2 (emphasis in original).

[321] And, punitive standards should warrant greater procedural protection. *But see* Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992) (holding that a five-year mandatory exclusion under the Medicare statutes because of a $62.40 fraudulent claim was not punishment for purposes of the Double Jeopardy or Ex Post Facto clauses of the Constitution). By finding the exclusion not to be punitive, the court distinguished United States v. Halper, 490 U.S. 435, 448-49 (1989), which had held that the Double Jeopardy Clause is implicated when a criminal defendant, once punished following a prosecution, is also the subject of a later punitive civil sanction. 961 F.2d at 1542.

Not unlike the recommendations by the Temporary Conference in 1962, Congress should act to remove mandatory debarments in those statutes in which such sanctions are present and authorize administrative discretion with respect to imposing any such statutory debarments.[324] Similarly, Congress should permit agency discretion concerning the period of any statutory debarments and employ a general limit of three years as provided in the administrative arena.[325] Congress can achieve comparable social and economic goals by employing these prophylactic measures rather than enacting a panoply of quasi-punitive sanctions.[326]

X. Conclusion

The 1962 ACUS Temporary Conference report on debarment and suspension pointed out many procedural flaws and shortcomings in the then-existing practices concerning the debarment and suspension of federal contractors. Now, over three decades later, many of the changes recommended in 1962 have come to pass. Although these changes evolved slowly at times, the general procedural protections afforded to contractors have improved.

---

[322] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 294 (describing a debarment as "essentially a presumption or forecast of continuing nonresponsibility as a government contractor based on past misconduct").

[323] *See* FAR 9.406-2(a)(1), (3), (5), & (c); 48 CFR §§ 9.406-2(a)(1), (3), (5), & (c) (1993).

[324] *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 295 (Recommendations 29-9).

[325] Of course, agencies may exceed the regulatory presumptive period of three years in an exceptional case, or extend a debarment based on new facts. *See, e.g.*, FAR 9.406-4(a)-(b); 48 CFR §§ 9.406-4(a)-(b) (1993).

[326] In a meeting conducted as part of the research for this project with several members of the Debarment & Suspension Committee of the ABA Public Contract Law Section (including the Chair), those present expressed strong concerns about the nature of the Congressional activity in this area over the last number of years. Interview with Richard Bednar, Chair, & Various Members, Debarment & Suspension Committee, ABA Public Contract Law Section, in Washington, D.C. (May 6, 1994).

Moreover, the applicability of these sanctions has expanded into the nonprocurement arena as well, with the development of generally similar procedures. There will always, no doubt, be a certain level of tension between the government's efforts to assure that it deals only with responsible concerns and private parties' attempts to demonstrate present responsibility despite alleged or actual prior wrongdoing. The procedural protections now in place represent a fair and reasonable framework for balancing these competing interests. Beyond the specific recommendations discussed above, major changes are not warranted at this time. On the other hand, agency officials should bear in mind the significant duties entrusted to them by the debarment and suspension regulations, and should exercise good judgment in the substantial discretion that has been afforded to them.

APPENDIX A

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

COMMITTEE ON ADJUDICATION OF CLAIMS

DEBARMENT AND SUSPENSION OF PERSONS FROM GOVERNMENT CONTRACTING AND FEDERALLY ASSISTED CONSTRUCTION WORK

OCTOBER 1, 1962

Recommendation No. 29, submitted to the Conference by the Committee on Adjudication of Claims, was approved by the Conference at its Fifth Plenary Session, October 17, 1962. This is the Committee Report in support of the recommendation.

RECOMMENDATION NO. 29

PART I. PROCEDURAL FAIRNESS IN THE DEBARMENT OF CONTRACTORS

It Is Recommended That—

29–1. (a) Except as provided in subparagraph (b) below, government debarment of an individual or firm from the contracts or subcontracts of a government department or agency or from participating in any federally assisted construction work should be preceded by (i) notice of proposed debarment to the parties in question, including all affiliated firms sought to be debarred, and (ii) oportunity to such parties to have a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue.

(b) Debarments from government contracts and subcontracts made in conformity with subparagraph (a) above may be applied by other government agencies to their contracting and subcontracting without opportunity for an adversary hearing, but only after notice and opportunity to the parties concerned, including all affiliated firms sought to be debarred, to explain why the debarment should not be so extended in whole or in part.

(c) Notices of proposed debarment should be supported by reasons.

(d) No agency should exclude or remove on grounds of lack of responsibility any individual or firm from any list of qualified persons eligible for government contracts or subcontracts except in conformity with the principles set forth herein and in Recommendation No. 29–2 and Recommendation No. 29–3.

(e) The provisions of this Recommendation No. 29–1 shall not apply to the individual rejection of any bid or proposal, the procedures for which are set forth in Recommendation No. 29–4.

29–2. (a) In cases of criminal conviction or civil judgment affecting an individual's or firm's present responsibility as a government contractor or subcontractor, or upon probable cause for belief that an individual or firm has committed fraud or has engaged in other conduct showing a substantial lack of present responsibility as a government contractor or subcontractor as determined in writing by the agency head or his designee, notice of proposed debarment may also provide for the temporary suspension of the individual or firm from further contracting or subcontracting with the government agency concerned pending administrative determination of the debarment issue. Such suspensions should not exceed a reasonable time, and in no event should they exceed the time limits set forth in subparagraph (b) below.

(b) Any suspension authorized in accordance with subparagraph (a) above, should be subject to the following limitations:

(1) If a notice of suspension and proposed debarment is based in whole or in part upon alleged fraud incident to obtain-

ing or performing a government contract or subcontract or upon any other alleged conduct showing a present lack of integrity or honesty as a government contractor or subcontractor and if within one year of such notice of suspension and proposed debarment the individual or firm concerned has been or is criminally charged by Federal indictment or information or has become or becomes a party to a suit involving the United States or its officers and the subject matter of such indictment, information or suit includes the substance of the reasons set forth in such notice of suspension and proposed debarment, the suspension may continue for the duration of any trial in a Federal court of first instance of the issues covered by such notice of suspension and proposed debarment and for 120 days thereafter (during which period any debarment action should be completed). However, if such indictment, information or suit is not returned or instituted within one year of such notice of suspension and proposed debarment, the suspension should thereupon terminate, but without prejudice to any right of debarment, unless the Attorney General or his designee (but not below the level of an Assistant Attorney General) should determine and notify the head of the department or agency that issued the notice of suspension and proposed debarment, that disclosure, for purposes of administrative debarment from government contracting, of the Government's evidence of fraud or of lack of honesty or integrity on the part of the individual or firm concerned would be substantially harmful to the Government's law enforcement activities or to the successful criminal or civil prosecution of such individual or firm. If the Attorney General or his designee makes such a determination, the suspension may continue for a period not to exceed 18 months from the notice of suspension and proposed debarment and may continue for the duration of any trial if an indictment, information or suit is returned or instituted within such 18-month period, as provided in the first sentence of this subparagraph (b)(1). If a suspension is made or continued on the basis of such a determination, a further notice of suspension should be furnished to the individual or firm concerned. Nothing in this subparagraph (b)(1) shall prevent the reimposition of a suspension in accordance with subparagraph (a), above, whenever such indictment, information or suit is returned or instituted, in which event the suspension may continue for the duration of any trial as provided in the first sentence of this subparagraph (b)(1), and any administrative trial-type hearing previously begun for the purpose of determining the related debarment issue will thereupon terminate without determination.

(2) If a notice of suspension and proposed debarment is issued for reasons other than those covered by subparagraph (b)(1), above, the period of suspension should not exceed 90 days. Suspension for such other reasons beyond 90 days (but not to exceed an additional 90 days) should not be imposed except upon a written determination by an official of the rank of Assistant Secretary, or the equivalent, of the reasons and necessity therefore; any continuations of such 90-day periods should be accompanied by new determinations of the same kind. A copy of each such

determination should be furnished to the suspended individual or firm. In no event should suspension under this subparagraph (b) (2) exceed one year or be in addition to any period of suspension under subparagraph (b) (1), above.

29–3. Except as provided in Recommendation 29–2 and subject to Recommendation 29–4, the practice of summary suspensions of individuals and firms from Government contracting without notice and opportunity for a trial-type hearing should be discontinued.

29–4. Any government rejection of an otherwise successful bid or offer incident to obtaining a government contract or subcontract solely or primarily on the ground that the proposed contractor or subcontractor is believed to be lacking in business integrity or business honesty should be preceded by written explanation to such proposed contractor or subcontractor by the contracting officer of the reasons for that belief and by the opportunity for such proposed contractor or subcontractor to reply to the contracting officer within a reasonable period of time consistent with the need for making a contract or subcontract award in a timely manner.

29–5. Agency rules of procedure and practice in all types of debarments should be published, should be uniform to the extent practicable, and should provide for a fair and speedy determination.

29–6. Government debarment of an individual or firm from the contracts or subcontracts of a government department or agency or firm participating in any federally assisted construction work should be evidenced by a decision in writing, which decision sets forth findings and conclusions as well as the reasons or basis therefor. Such decision should be furnished to the debarred individual or firm. In cases of debarment following a trial-type hearing, all debarment decisions (including decisions to extend debarments in accordance with Recommendaton 29–1(b) should be published or, in accordance with published rule, made available for public inspection, except those which are required to be held confidential for good cause found by the agency head or his designee and therefore may not be cited as precedents.

PART II. GROUNDS AND SCOPE OF DEBARMENT

It Is Recommended That—

29–7. (a) All grounds for debarment should be explicitly set forth in appropriate agency regulations, which regulations should be published, and, to the extent practicable and desirable, be uniform.

(b) Such regulations should to the extent feasible set forth standards and criteria for (i) determining business affiliates of debarred firms and individuals, (ii) extending debarment to such affiliates, (iii) determining when fraud or criminal conduct of an owner, stockholder, officer, director, or employee will be imputed to a business firm or when termination of such person's relationship to the firm will avoid or remove debarment of the firm, and (iv) determining the scope of administrative debarments in terms of their applicability to all agency contracts or subcontracts with the debarred firm or individual or to particular types of contracts or subcontracts, or to contracts or subcontracts for particular products or services.

(c) The grounds for administrative debarment should include, without limitation, fraud incident to obtaining or performing a government contract or subcontract or any other conduct showing a serious and present lack of business integrity or business honesty as a government contractor or subcontractor. Findings of such fraud or other conduct should be based on substantial evidence which may include a criminal or civil judgment or any findings of fact therein relating materially to the grounds of debarment.

PART III. DEBARMENT PERIODS

It Is Recommended That—

29–8. The Armed Services and Federal Procurement Regulations and the regulations of the Secretary of Labor issued pursuant to the Reorganization Plan No. 14 of 1950 (i) should be amended to provide that, except as otherwise provided by statute or Executive order, debarment should be for a reasonable, definitely stated period of time, commensurate with the seriousness of the cause therefor, but not to exceed 3 years, and (ii) should expressly provide for removal of debarment within the debarment period upon a showing of current responsibility to perform government contracts or subcontracts or to participate in federally assisted construction work, as the case may be.

29–9. Congress should be requested to amend the Buy American and Davis-Bacon Acts to remove the absolute debarment penalties and to authorize administrative discretion with regard to the scope of debarment and to the period of debarment in conformity with the principles set forth in Recommendation 29–8 above.

APPENDIX B

Subpart 9.4—Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of *ineligible* in 9.403); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989]

9.401 Applicability.

This subpart does not apply to the exclusion of participants or principals from Federal financial or nonfinancial assistance programs and benefits pursuant to Executive Order 12549. Such exclusions are contained within the list entitled Parties Excluded from Nonprocurement Programs of the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989]

9.403 Definitions.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliates. Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contract or that was debarred, suspended, or proposed for debarment.

Agency, as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

Civil judgment means a judgment or finding of a civil offense by any court of competent jurisdiction.

Contractor, as used in this subpart, means any individual or other legal entity that—

(a) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(b) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

Conviction means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

Debarment, as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is *debarred.*

Debarring official means (a) an agency head or (b) a designee authorized by the agency head to impose debarment.

Indictment means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible, as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Parties Excluded from Procurement Programs, formerly referred to as the Consolidated List of Debarred, Suspended, and Ineligible Contractors means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred, suspended, or proposed for debarment by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority other than Executive Order 12549. The list of Parties Excluded from Procurement Programs is contained within the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

Preponderance of the evidence means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Suspending official means (a) an agency head or (b) a designee authorized by the agency head to impose suspension.

Suspension, as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is *suspended*.

Unfair trade practices, as used in this subpart, means the commission of any of the following acts by a contractor:

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, *et seq.*) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

9.404 Parties excluded from procurement programs.

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

(2) Periodically revise and distribute the list and issue supplements, if necessary, to all agencies and the General Accounting Office; and

(3) Include in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The list entitled Parties Excluded from Procurement Programs shall indicate—

(1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The name of the agency or other authority taking the action;

(3) The cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) The effect of the action;

(5) The termination date for each listing;

(6) The DUNS No.; and

(7) The name and telephone number of the point of contact for the action.

(c) Each agency shall—

(1) Notify GSA of the information required by paragraph (b) above within 5 working days after the action becomes effective;

(2) Notify GSA within 5 working days after modifying or rescinding an action;

(3) Notify GSA of the names and addresses of agency organizations that are to receive the consolidated list and the number of copies to be furnished to each;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(5) Establish procedures to provide for the effective use of the Parties Excluded from Procurement Programs, including internal distribution thereof,

to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the Parties Excluded from Procurement Programs, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors to the agency or other authority that took the action.

(d) Information on the list of Parties Excluded from Procurement Programs is available as follows:

(1) The printed version is published monthly. Copies may be obtained by purchasing a yearly subscription.

(i) Federal agencies may subscribe to the list through their organization's printing and distribution office.

(ii) The public may subscribe by writing the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238.

(2) The electronic version is updated daily and provides access to the names of firms and individuals on the list by using an asynchronous ASCII terminal (e.g., a word processor or microcomputer). Users can access the system 24 hours a day, 7 days a week using FTS 2000, or commercial telephone lines and the equipment described in the user's manual. Aside from the normal costs of local or long-distance telephone calls, access is free of charge to the user. To obtain a copy of the user's manual for accessing the system, contact GSA at (202) 501-4740.

(3) A telephone inquiry service to answer general questions about entries on the list of Parties Excluded from Procurement Programs is also available by calling GSA at (202) 501-0688. The inquiry will be answered within one working day.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989; 57 FR 60577, Dec. 21, 1992]

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the acquiring agency's head or designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.50(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors included on the Parties Excluded from Procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see part 28).

(d) (1) After the opening of bids or receipt of proposals, the contracting officer shall review the List of Parties Excluded from Procurement Programs.

(2) Bids received from any listed contractor in response to an invitation for bids shall be entered on the abstract of bids, and rejected unless the acquiring agency's head or designee determines in writing that there is a compelling reason to consider the bid.

(3) Proposals, quotations, or offers received from any listed contractor shall not be evaluated for award or included in the competitive range, nor shall discussions be conducted with a listed offeror during a period of ineligibility, unless the acquiring agency's head or designee determines, in writing, that there is a compelling reason to do so. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations, or offers.

(4) Immediately prior to award, the contracting officer shall again review the List to ensure that no award is made to a listed contractor.

[48 FR 42142, Sept. 19, 1983, as amended at 52 FR 9038, Mar. 20, 1987; 54 FR 19814, May 8, 1989; 54 FR 48982, Nov. 28, 1989; 55 FR 21707, May 25, 1990; 56 FR 29127, June 25, 1991]

9.405-1 Continuation of current contracts.

(a) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension.

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject to Government consent (see subpart 44.2), contracting officers shall not consent to subcontracts with such contractors unless the acquiring agency's head or a designee states in writing the compelling reasons for this approval action. (See 9.405(b) concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors shall not enter into any subcontract in excess of the small purchase limitation at 13.000 with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion on the list of Parties Excluded from Procurement Programs (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor being on the list of Parties Excluded from Procurement Programs;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement Programs; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see subpart 44.3).

[54 FR 19815, May 8, 1989, as amended at 56 FR 29127, June 25, 1991]

9.406 Debarment.

9.406-1 General.

(a) It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the debarring official should consider factors such as the following:

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

The existence or nonexistence of any mitigating factors or remedial measures such as set forth in this paragraph (a) is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.

(b) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring official may extend the debarment decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond (see 9.406–3(c)).

(c) A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(d)(1) When the debarring official has authority to debar contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to the Federal Property Management Regulations (FPMR) 101–45.6, that official shall consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the debarment notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

[48 FR 42142, Sept. 19, 1983, as amended at 52 FR 6121, Feb. 27, 1987; 54 FR 19815, May 8, 1989; 55 FR 21707, May 25, 1990; 55 FR 30465, July 26, 1990; 56 FR 67129, Dec. 27, 1991]

9.406–2 Causes for debarment.

(a) The debarring official may debar a contractor for a conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(1) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(i) Willful failure to perform in accordance with the terms of one or more contracts; or

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(2) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(3) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold or shipped to the United States, when the product was not made in the United States (see section 202 of the Defense Production Act (Pub. L. 102-558)).

(4) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558)).

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31, 1989; 54 FR 19815, May 8, 1989; 55 FR 21707, May 25, 1990]

9.406–3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested—

(1) That debarment is being considered;

(2) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) Of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment.

(d) *Debarring official's decision.* (1) In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an acquiring agency or a designee makes the statement called for by 9.406-1(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19815, May 8, 1989]

9.406-4 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that debarment for violation of the provisions of the Drug-Free Workplace Act of 1988 (see 23.506) may be for a period not to exceed 5 years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of 9.406-3 above shall be followed to extend the debarment.

(c) The debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring offical deems appropriate.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31 ,1989; 54 FR 19815, May 8, 1989; 55 FR 21707, May 25, 1990]

9.406–5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407–1 General.

(a) The suspending official may, in the public interest, suspend a contractor for any of the causes in 9.407–2, using the procedures in 9.407–3.

(b)(1) Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

(b)(2) The existence of a cause for suspension does not necessarily require that the contractor be suspended. The suspending official should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures or mitigating factors, such as those set forth in 9.406–1(a). A contractor has the burden of promptly presenting to the suspending official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists. The existence or nonexistence of any remedial measures or mitigating factors is not necessarily determinative of a contractor's present responsibility.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending official may extend the suspension decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the suspension and an opportunity to respond (see 9.407–3(c)).

(d) A contractor's suspension shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)(1) When the suspending official has authority to suspend contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to FPMR 101–45.6, that official shall consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the suspension notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

on an indictment or (ii) a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(d) *Suspending official's decision.* (1) In actions (i) based on an indictment, (ii) in which the contractor's submission does not raise a genuine dispute over material facts, or (iii) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official's decision shall be based on all the information in the administrative record, including any submission made by the contractor.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of (i) suspension by any other agency or (ii) debarment by any agency.

(4) Prompt written notice of the suspending official's decision shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested.

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

9.407-4 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in this subsection.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

9.407-5 Scope of suspension.

The scope of suspension shall be the same as that for debarment (see 9.406-5), except that the procedures of 9.407-3 shall be used in imposing suspension.

9.408 Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.

(a) When an offeror, in compliance with the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, indicates an indictment, charge, civil judgment, conviction, suspension, debarment, proposed debarment, ineligibility, or default of a contract, the contracting officer shall—

(1) Request such additional information from the offeror as the contracting officer deems necessary in order to make a determination of the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment.

(b) Offerors who do not furnish the certification or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible.

[54 FR 19816, May 8, 1989]

9.409 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, in solicitations where the contract value is expected to exceed $25,000.

(b) The contracting officer shall insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in solicitations and contracts where the contract value exceeds $25,000.

9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(5) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see section 202 of the Defense Production Act (Pub. L. 102-558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558)); or

(7) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31, 1989; 55 FR 21707, May 25, 1990]

9.407-3 Procedures.

(a) *Investigation and referral*. Agencies shall establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) *Decisionmaking process*. (1) Agencies shall establish procedures governing the suspension decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension*. When a contractor and any specifically named affiliates are suspended, they shall be immediately advised by certified mail, return receipt requested—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities (i) of a serious nature in business dealings with the Government or (ii) seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities shall be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts; and

(6) That additional proceedings to determine disputed material facts will be conducted unless (i) the action is based

APPENDIX C

Subpart E—Entitlement [Reserved]

PART 67—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart A—General

Sec.
67.100 Purpose.
67.105 Definitions.
67.110 Coverage.
67.115 Policy.

Subpart B—Effect of Action

67.200 Debarment or suspension.
67.205 Ineligible persons.
67.210 Voluntary exclusion.
67.215 Exception provision.
67.220 Continuation of covered transactions.
67.225 Failure to adhere to restrictions.

Subpart C—Debarment

67.300 General.
67.305 Causes for debarment.
67.310 Procedures.
67.311 Investigation and referral.
67.312 Notice of proposed debarment.
67.313 Opportunity to contest proposed debarment.
67.314 Debarring official's decision.
67.315 Settlement and voluntary exclusion.
67.320 Period of debarment.
67.325 Scope of debarment.

Subpart D—Suspension

67.400 General.
67.405 Causes for suspension.
67.410 Procedures.
67.411 Notice of suspension.
67.412 Opportunity to contest suspension.
67.413 Suspending official's decision.
67.415 Period of suspension.
67.420 Scope of suspension.

Subpart E—Responsibilities of GSA, Agency, and Participants

67.500 GSA responsibilities.
67.505 Department of Justice responsibilities.
67.510 Participants' responsibilities.

Sec.

Subpart F—Drug-Free Workplace Requirements (Grants)

67.600 Purpose.
67.605 Definitions.
67.610 Coverage.
67.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.
67.620 Effect of violation.
67.625 Exception provision.
67.630 Certification requirements and procedures.
67.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

APPENDIX A TO PART 67—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS
APPENDIX B TO PART 67—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS
APPENDIX C TO PART 67—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*), Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711, *et seq.* (as amended), Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601, *et seq.* (as amended), Victims of Crime Act of 1984, 42 U.S.C. 10601, *et seq.* (as amended); 18 U.S.C. 4042; and 18 U.S.C. 4351-4353.

SOURCE: 53 FR 19188 and 19204, May 26, 1988, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes affecting this part appear in Order No. 1271-88, 53 FR 19188, May 26, 1988.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Subpart A—General

§ 67.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in § 67.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§ 67.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or,* a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for exemple, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated.

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§ 67.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 67.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 67.110(a). Sections 67.325, "Scope of debarment," and 67.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR subpart 9.4.

§ 67.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B—Effect of Action

§ 67.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, no agency shall enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 67.215.

(b) *Loser tier covered transactions.* Except to the extent prohibited by law, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 67.110(a)(1)(ii)) for the period of their debarment or suspension.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

§ 67.205 Ineligible persons.

Persons who are ineligible, as defined in § 67.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 67.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 67.315 are excluded in accordance with the terms of their settlements. Department of Justice shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 67.215 Exception provision.

Department of Justice may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 67.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 67.505(a).

§ 67.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in § 67.215.

§ 67.225 Failure to adhere to restrictions.

Except as permitted under § 67.215 or § 67.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

Subpart C—Debarment

§ 67.300 General.

The debarring official may debar a person for any of the causes in § 67.305, using procedures established in §§ 67.310 through 67.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 67.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 67.300 through 67.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 67.215 or § 67.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 67.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in § 67.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19188 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4959, Jan. 31, 1989; 55 FR 21699, May 25, 1990]

§ 67.310 Procedures.

Department of Justice shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 67.311 through 67.314.

§ 67.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 67.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 67.305 for proposing debarment;

(d) Of the provisions of §§ 67.311 through 67.314, and any other Department of Justice procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§ 67.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§ 67.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 67.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 67.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, Department of Justice may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E).

§ 67.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (*see* 67.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 67.311 through 67.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

[53 FR 19188 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4959, Jan. 31, 1989; 55 FR 21699, May 25, 1990]

§ 67.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 67.311 through 67.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew

of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§ 67.400 General.

(a) The suspending official may suspend a person for any of the causes in § 67.405 using procedures established in §§ 67.410 through 67.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 67.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 67.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 67.400 through 67.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 67.305(a); or

(2) That a cause for debarment under § 67.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 67.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* Department of Justice shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §§ 67.411 through 67.413.

§ 67.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 67.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§ 67.411 through 67.413 and any other Department of Justice procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§ 67.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§ 67.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 67.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 67.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 67.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 67.325), except that the procedures of §§ 67.410 through 67.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Agency and Participants

§ 67.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 67.505 Department of Justice responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which Department of Justice has granted exceptions under § 67.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 67.500(b) and of the exceptions granted under § 67.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

§ 67.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 67.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 67.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management governmentwide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 67.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 67.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § 67.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 67.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 67.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 67.320(a)(2) of this part).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 67.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligiblity of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to Department of Justice if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: Order No. 1416-90, 55 FR 21688, 21696, May 25, 1990, unless otherwise noted.

§ 67.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 67.605 Definitions.

(a) Except as amended in this section, the definitions of § 67.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

Report for Recommendation 95-3

Agency Review of Existing Regulations

Sidney A. Shapiro
John M. Rounds Professor of Law
University of Kansas

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

INTRODUCTION 411

I. THE ABA REPORT 411

II. MANDATES FOR REVIEW 412
  - A. Legislative Mandates 412
    - 1. Regulatory Flexibility Act 413
    - 2. Rulemaking Petitions 413
    - 3. GPRA 413
  - B. Executive Mandates 414
  - C. Agency Mandates 416
  - D. Proposed Legislation 417
    - 1. Rulemaking Petitions 417
    - 2. Review Procedures 418
  - E. The Role of Legal Mandates 420

III. THE REVIEW PROCESS 424
  - A. Management 424
    - 1. Appointment Of A Manager 425
    - 2. Review Process 425
    - 3. Staff Input 425
    - 4. The Review Staff 426
    - 5. Choice of Rules 426
  - B. Methodology 428
  - C. Measurement 429
  - D. Public Input 432

IV. REDUCING THE NEED FOR RULE REVISIONS 436
  - A. More Flexible Regulations 437
  - B. Interim Final Rules 438
  - C. Interpretation of Rules 439

V. MORE EFFICIENT RULEMAKING 439
  - A. Management 440
  - B. Direct Final Rules 441
  - C. Executive Oversight 441
  - D. Congressional Coordination 442

Introduction

On February 23, 1995, President Clinton ordered administrative agencies to review existing regulations and identify which rules were obsolete, unnecessary, or could be eliminated for other reasons.[1] This order is in addition to an earlier executive order that requires agencies to have a program for the review of existing regulations.[2] President Bush mandated a similar review in January 1992, when he ordered a 90 day moratorium on new regulations.[3] These actions indicate the high priority that these administrations have assigned to the review of existing regulations.

The American Bar Association (ABA) has studied the experience of departments and agencies in responding to the Bush order and in conducting review programs generally. This paper evaluates the ABA report and other information concerning these programs. Part I explains the relationship of this report to the ABA study. Part II documents existing and proposed legal obligations of agencies to review their regulations. Part III explains what is known about current review programs and makes recommendations concerning how such programs can be improved. Part IV considers what steps agencies can take to reduce the need to revise regulations after they are promulgated. Finally, Part V considers how the rulemaking process can be made more efficient to permit agencies to revise or rescind regulations more expeditiously.

I. The ABA Report

This paper is based on a report written for the Administrative Law and Regulatory Practice Section of the ABA (Section) by Neil Eisner and Judy Kaleta, who are attorneys in the Department of Transportation.[4] The ABA report was based on the responses to a letter and questionnaire distributed to federal departments and agencies in April 1993. The letter explained the general background and purpose of the study. The questionnaire contained twenty inquiries concerning the general nature of existing regulations and reviews, public participation, the review process, staffing, impact analyses, and resources and time.[5] Sixteen departments and agencies responded either in writing or by meeting with Eisner and Kaleta. A list of the departments and agencies that responded is attached to the ABA Report.

---

[1] Alexis Simendinger, *Regulatory Reform: Clinton Issues Regulatory Directive; Opposes GOP Reg Moratorium, Contract*, Nat'l Env't Daily (BNA) (Feb. 23, 1995).

[2] Exec. Order 12866, §5, 3 CFR §644 (1993 Comp.).

[3] *Bush Announces 90-Day Moratorium on Rules: Reilly Says He Will Re-Examine Waste Standards*, 22 Env't Rep. (BNA) 2294 (Jan. 31, 1993).

[4] Federal Agency Reviews of Existing Regulations: A report of the American Bar Association, Section of Administrative Law & Regulatory Practice, containing information and suggestions for conducting reviews of existing regulations (1994) [hereinafter cited as ABA Report].

At its October meeting, the Section authorized the distribution of the report for information purposes to rulemaking departments and agencies. At its February meeting, the Section passed a recommendation concerning agency review of existing rules to be submitted to the ABA House of Delegates at its August 1995 meeting. If the House of Delegates adopts the Section's recommendations, they will be ABA policy.

The ABA authors, Eisner and Kaleta, have done a remarkable public service in gathering and presenting the information contained in the ABA report. Although I rely significantly on their work, I have reorganized and augmented their effort.

II. Mandates for Review

Agency review of existing regulations takes place in response to a number of legal mandates. Congress has imposed obligations to review existing regulations and is considering additional requirements. As noted earlier, President Clinton has ordered agencies to undertake the review of existing regulations. Finally, some agencies have adopted regulations or policies concerning this subject. This section describes the scope of existing and proposed legal mandates to review existing rules and evaluates the impact of these requirements.

A. Legislative Mandates

Agencies are subject to three legislative mandates to review existing regulations. The Regulatory Flexibility Act requires agencies to review periodically regulations that have an impact on small businesses.[6] The Administrative Procedure Act (APA) requires agencies to respond to rulemaking petitions that request an agency to revise or rescind a regulation.[7] Finally, the Government Performance and Review Act (GPRA), which requires agencies to establish strategic plans and measure their performance in reaching those goals,[8] apparently compels agencies to assess the impact of their rules.[9]

---

[5] *Id.*

[6] 5 USC §§601- 612 (1988 & Supp. V. 1993).

[7] 5 USC §553(e).

[8] P.L. 103-62, 107 Stat. 291 (1993).

[9] *See infra* section IIA3.

1. Regulatory Flexibility Act

The Regulatory Flexibility Act, which directs agencies to consider the impact of proposed regulations on small businesses,[10] also requires the review of existing regulations. Agencies must review once every ten years existing regulations that have a significant economic impact on a substantial number of small entities.[11] An agency is required to assess: (i) the continued need for a rule; (ii) the nature of complaints or comments received concerning it; (iii) the complexity of a rule; (iv) the extent to which a rule duplicates, overlaps, or conflicts with other federal rules, and to the extent feasible, state and local regulations, and (v) the length of time since the rule has been evaluated and the degree to which there have been changes in conditions in the area affected by the rule.[12]

2. Rulemaking Petitions

Review under the Flexibility Act is limited to regulations that adversely impact a substantial number of small businesses. The APA imposes an additional obligation to review regulations by establishing "the right to petition for the issuance, amendment, or repeal of a rule."[13] If an agency does not grant a petition, it must give prompt notice of the denial and include a brief statement of the grounds of denial.[14] The petitions process, however, only generates review of a regulation if someone petitions an agency for this action. Individuals or entities may fail to file a petition because they lack knowledge concerning the process, do not have the resources to take this step, or believe that the agency will not respond favorably to their input.[15]

3. GPRA

Regulations may escape review under the previous processes because they are not subject to petitions or do not adversely affect a substantial number of small businesses. The GPRA also obligates agencies to study the impact of their regulations, but it may not plug this gap. This legislation requires each agency to submit to OMB a "strategic plan" for program activities by Sept. 30, 1997.[16] A program includes any activity or project listed in the program and financing schedules of the federal budget.[17] The goals must be stated in "an objective, quantifiable, and measurable form" unless OMB authorizes some alternative form of measurement.[18] An agency must report annually to the President and Congress on its performance in achieving its plan beginning no later than March 31, 2000.[19] These reports must explain the agency's success in achieving its performance goals and, if goals were not met the reasons for the lack of success.[20]

---

[10] 5 USC §§603-604.

[11] *Id.* §610.

[12] *Id.*

[13] 5 USC §553(e).

[14] *Id.* §555(e).

[15] *See* ABA Report, *supra* note 4, at 18 ("Even agencies with clear procedures for petitions for rulemaking often find that the regulated community prefers to seek legislative change in lieu of petitioning the agency.").

[16] 5 USC §306(a).

How rulemaking agencies will comply with the act is unclear. For example, the act does not require that an agency study the impact of specific rules, but it does appear to require agencies to measure the overall success of their regulations.[21] The act requires pilot programs[22] and these are under way.[23] Since OSHA is one of the pilot programs, rulemaking agencies should have additional information concerning compliance.

B. Executive Mandates

Agencies are subject to legislative mandates to review existing regulations, but these do not cover all regulations or even all significant regulations. Regulations can escape review because they are not subject to the Regulatory Flexibility Act or the petitions process. The GPRA appears to require agencies to measure the overall impact of their regulatory programs, but it does not require the assessment of individual rules. President Clinton, however, has obligated agencies to adopt programs for the review of existing regulations by executive order. This section describes and evaluates the scope of this mandate.

President Clinton's Executive Order 12866 requires agencies to submit to the Office of Information and Regulatory Affairs (OIRA) a "program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations...."[24] A "significant" regulation is one that is likely to have an annual effect on the economy of $100 million or has other important economic or social effects.[25] Agencies are to determine which regulations "should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and principles set for [Executive Order 12866]."[26] The order also directs the Administrator of OIRA and the Regulatory Working Group, comprised of the Vice President, presidential policy advisors, and the heads of some agencies, to pursue regulatory review.[27] Finally, the order invites state, local, and tribal governments to assist in identifying regulations that impose "significant or undue burdens" on them, or that are otherwise inconsistent with the public interest.[28]

---

[17] 31 USC §1115 (f)(6).

[18] *Id.* §§1115 (a)(2), (b).

[19] *Id.* §1116(a).

[20] *Id.* §1116(d).

[21] *See supra* notes 17-18.

[22] 31 USC §1118.

[23] Memorandum For The Heads of Departments and Agencies Designated As Pilot Projects Under P.L. 103-62 from Alice B. Rivlin, Acting Director, OMB (Sept. 23, 1994).

[24] Exec. Order 12866, *supra* note 2, §5(a).

[25] *Id.* §3(f).

OIRA released a report on the first year of Executive Order 12866 in December 1994.[29] Although agencies were "somewhat further along" in implementing the administration's look-back requirements than six months earlier," OIRA stated that "real progress will depend on the extent to which senior policy officials recognize and attend to this effort."[30] OIRA acknowledged that agency managers were "understandably focused on meeting obligations for new rules, often under statutory or court deadlines, at a time when staff and budgets are being reduced,"[31] and that "it is hard to muster resources for the generally thankless task of rethinking and rewriting current regulatory programs."[32] Moreover, OIRA noted that its look-back provisions required a substantial commitment from agencies. The report explained:

> [The look-back] is *not* directed at a simple elimination or expending of specific regulations from the Code of Federal Regulations. Not does it envision tinkering with regulatory provisions to consolidate or update provisions. Most of this type of change has already been accomplished, and the additional dividends to be realized are unlikely to be significant. Rather, the look-back provided for in the Executive Order speaks to a fundamental re-engineering of entire regulatory systems, many of which remained fundamentally unchanged for 30 to 50 years.[33]

Finally, OIRA gave examples of some agencies that were engaged in such fundamental changes.[34]

---

[26] *Id.* §5(a).

[27] *Id.* §5(b).

[28] *Id.*

[29] The First Year of Executive Order 12866, A Report Prepared By OIRA Administrator Sally Katzen (Dec. 20, 1994), *reprinted in* O.S.H. REP. (BNA) 1609 (Jan. 4, 1995).

[30] *Id.* at 1618.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1618-20.

President Clinton extended the obligation of departments and agencies to review existing regulations on February 21, 1995.[35] He required agencies "to conduct a page-by-page review of all your regulations now in force and [to] eliminate or revise those that are outdated or otherwise in need of reform."[36] The review is to consist of at least five criteria: (i) Is a regulation obsolete?; (ii) Could its intended goal be achieved in more efficient, less intrusive ways?; (iii) Are there better private sector alternatives, such as market mechanisms, that can better achieve the public good envisioned by the regulation?; (iv) Could private business, setting its own standards and being subject to public accountability, do the job as well?; and (v) Could the States or local governments do the job, making Federal regulation unnecessary?[37] The President ordered agencies to deliver to him by June 1, 1995, a list of regulations that will be eliminated or modified.[38]

The President's directive establishes a firm deadline for agencies to complete a review of existing rules. His prior order did not contain such a deadline. Moreover, the President has redirected the review program or at least augmented its goals. The President has required agencies to search out outdated regulations or regulations that are otherwise in need of reform. The OIRA report identified the goal of the administration's review program as a fundamental re-engineering of entire regulatory systems.

C. Agency Mandates

Some departments and agencies have mandated the review of existing regulations in operations manuals or orders. In the Department of Defense (DOD), for example, every regulation is reviewed on a two-year cycle according to the DOD Directives Systems Review Program.[39] The Department of Interior, in its departmental manual, and the Federal Deposit Insurance Corporation, in a policy statement, have established five-year review cycles.[40] These entities have also set criteria for the review of rules. The criteria focus on the age of a rule, its economic impact, the burden it poses on industry, whether it duplicates another federal requirement, and whether it is inconsistent with a change in a law or administration policy.[41]

---

[35] Supra, note 1.

[36] Memorandum For Heads of Departments and Agencies From William J. Clinton On Regulatory Reinvention Initiative 2 (Mar. 4, 1995).

[37] *Id.*

[38] *Id.* Agencies are to indicate which regulations can be modified or eliminated administratively and which will require legislative authority for modification or elimination. *Id.*

[39] ABA Report, *supra* note 4, at 10.

[40] *Id.*

[41] *Id.*

D. Proposed Legislation

Agencies are now legally obligated to engage in the review of existing regulations as the result of legislative, executive, and agency mandates. Legislation pending in the Senate would alter the current petition process and establish procedures for the review of existing regulations. This section discusses proposals that illustrate the nature of the reforms being considered. Because reform legislation is in a state of flux in the Senate, some of the details described below may have been altered after this section was written.

1. Rulemaking Petitions

Amendments proposed by Senators Hatch and Grassley[42] to legislation originally sponsored by Senator Dole[43] illustrate how Congress might amend the current petitions process. This bill would extend the right to petition to the issuance, amendment, or repeal of an interpretive rule, general statement of policy, or guidance.[44] Agencies would have 180 days to respond to such a petition.[45] An agency must grant the petition if there is a "reasonable likelihood" that the subject of the petition has the effect of a major rule and amendment or repeal is necessary to satisfy the decisional criteria for new rules.[46] For purposes of this requirement, a major rule is defined as any rule that is likely to have a gross annual effect of $50 million or more in costs or that has a significant effect on the economy.[47] Under the criteria for promulgation of new rules, an agency must find that the benefits of the rule exceed its costs and that the rule imposes the least costs with the greatest benefits of any of the reasonable alternative policies that the agency has the authority to adopt.[48] If, after consideration of the petition, the agency finds that the subject of the petition does not conform to the decisional criteria for new rules, it "shall take immediate action" to amend or rescind the rule, interpretative rule, policy statement, or guidance to conform with those criteria.[49]

---

[42] Substitute S. 343, 104th Cong., 1st Sess. §553(e) (1995) [hereinafter cited as Hatch\Grassley Amendments].

[43] S. 343, 104th Cong., 1st Sess. §625 (Feb. 9, 1995 version) [hereinafter cited as Dole Bill].

[44] Hatch\Grassley Amendments, *supra* note 42, §553(e)(3)(A). Individuals could also petition for the issuance of an interpretation of the meaning of a rule, interpretative rule, or a general statement of policy or guidance and for a variance or exemption from the terms of a rule. *Id.* §553(e)(2)(C)-(D).

[45] *Id.* §553(e)(4).

[46] *Id.* §553(e)(3)(B).

[47] *Id.* §621(4)(A)(i).

[48] *Id.* §624(b). If an agency is required by its statutory mandate to approve a rule that does not meet these requirements, the legislation would prohibit the agency from adopting that rule unless its rules imposes lower costs than any of the reasonable alternative rules. *Id.* §624(c). In addition, the agency must prepare a written explanation of why it is required to promulgate a rule with potential costs that are not justified by the potential benefits and transmit that explanation to Congress. *Id.* §624(d).

The legislation originally proposed by Senator Dole illustrates how Congress may extend the petitions process.[50] This bill would empower any person who is subject to a "major" rule to petition an agency to perform a cost-benefit analysis for that regulation.[51] For purposes of this requirement, a major rule is defined as any rule that is likely to have a gross annual effect of $50 million or more in costs or that has a significant effect on the economy.[52] Once an agency receives such a petition, it is required to respond within 180 days.[53] It must grant the petition if the petitioner shows "a reasonable likelihood that the cost of the major rule outweigh the benefits, or that reasonable questions exist as to whether the rule provides greater net benefits to society than any reasonable alternative to the rule that may be more clearly resolved through [a cost-benefit study]."[54] Under the Hatch and Grassley proposal, an agency has one year to complete its cost-benefit analysis.[55]

2. Review Procedures

The Hatch and Grassley proposal and legislation proposed by Senator Roth[56] would establish elaborate procedures for the review of existing regulations. These procedures address which rules must be reviewed, specify time deadlines for such review, and establish the process of review.

Both bills require an agency to review all existing major rules and any other rules selected by the agency.[57] In addition, the Hatch\Grassley Amendments would require review of rules that are "inconsistent with, or duplicative of, any other obligation or requirement established by any Federal statute, rule, or other agency statement, interpretation, or action that has the force of law."[58]

The bills require the following procedures. An agency must publish in the Federal Register a proposed schedule for completion of its review within nine months after the effective date of the legislation and request public input.[59] After the President has had the opportunity to add any rule to an agency's review agenda,[60] the agency must publish a final schedule for review within one year after the effective date of the legislation.[61] An agency would also be obligated to review any new major rules that it promulgated or any other rule that the President designated for review.[62]

---

[49] *Id.* §553(e)(3)(C).

[50] Dole Bill, *supra* note 43, §625.

[51] *Id.* §625(a)(1).

[52] *Id.*; *see id.* §621(4)(A)(i) (defining major rule). The right to petition for a cost-benefit analysis would include any "major" rule that the agency previously enacted, regardless whether a cost-benefit analysis had been done previously. *Id.* §625)(a)(1).

[53] *Id.* §625(d)(4).

[54] *Id.* §625(a)(3).

[55] Hatch\Grassley Amendments, *supra* note 42, §623(b).

[56] S. 291, 104th Cong., 1st Sess. (1995) (Jan. 27 version) [cited hereinafter as the Roth Bill].

[57] Hatch\Grassley Amendments, *supra* note 42, §627(a)(1)(A)(i), (iii); Roth Bill, *supra* note 56, §641(a)(1)(A).

[58] Hatch\Grassley Amendments, *supra* note 42, §627(a)(1)(A)(ii).

The legislation would also establish deadlines for rule review. The Roth bill would require that an agency complete its review of existing rules within ten years after the effective date of the legislation and of new rules within 10 years of their adoption.[63] If a review of a rule was not completed within these time periods, the rule would not longer be valid, but the President could extend a deadline to fifteen years at the agency's request."[64] The Hatch\Grassley proposal would terminate any rule that is not reviewed within seven years of the enactment of the legislation or five years after it is promulgated, except that the President could extend either time period to ten years.[65]

Both bills have procedures concerning public participation. An agency would be required to publish in the Federal Register four types of information concerning each rule under review.[66] First, it must identify its statutory authority for a rule and state whether the rule continues to fulfill the intent of Congress in enacting the rule. Second, the agency must publish an assessment of the benefits and costs of the rule during the period in which it has been in effect. Third, it must explain the proposed agency action concerning the rule. Fourth, it must invite proposals from the public for modifications and alternatives which may accomplish the objectives of the rule in a more effective or less burdensome manner. If an agency proposes to renew a rule without amendment, it would be obligated to give interested persons at least 60 days to comment on the proposed renewal of the rule.[67] The agency is then required to publish in the Federal

---

[59] Hatch\Grassley Amendments, *supra* note 42, §627(a)(1)(A)-(B); Roth Bill, supra note 56, §641(a)(1)(A)-(B).

[60] Hatch\Grassley Amendments, *supra* note 42, §627(a)(2); Roth Bill, *supra* note 60, §641(a)(2). The President can delegate this function to a subordinate. Unless the text indicates otherwise, any reference to the President in this section indicates that the President or his designee can perform the function being discussed.

[61] Hatch\Grassley Amendments, *supra* note 42, §627(a)(3); Roth Bill, *supra* note 56, §641(a)(3).

[62] Hatch\Grassley Amendments, *supra* note 42, §627(b)(1); Roth Bill, *supra* note 56, §641(b)(1).

[63] Roth Bill, *supra* note 56, §641(b)(1).

[64] Hatch\Grassley Amendments, *supra* note 42, §627(f).

[65] *Id.* §641(f).

[66] Hatch\Grassley Amendments, *supra* note 42, §627(c); Roth Bill, *supra* note 56, §641(c).

[67] Hatch\Grassley Amendments, *supra* note 42, §627(e)(1); Roth Bill, *supra* note 56, §641(e)(1).

Register a notice that the rule has been renewed and to justify why the rule is in compliance with the decisional criteria established by the legislation.[68]

E. The Role of Legal Mandates

Existing legal requirements have not resulted in an ongoing government wide process for agency review of existing regulations. The review requirements of the Regulatory Flexibility Act only apply to rules that impact on small businesses.[69] The petition process of the APA may cause an agency to review a rule, but only if a petition is filed.[70] The GPRA obligates agencies to measure the overall impact of their rules, but it does not require the review of individual rules.[71] The President ordered agencies to establish a review program at the start of his administration, but most agencies have not yet complied.[72] The President has sought to remedy this oversight by ordering a one-time review with a short deadline.[73] Finally, only a few agencies have obligated themselves to conduct an ongoing review process.[74]

Previous experience with President Bush's one-time review under a short deadline indicates that this approach to review may not yield productive results. When President Bush ordered a 90-day moratorium on new regulations in January 1992,[75] he also ordered departments and agencies "to evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth."[76] Agencies told the ABA that they had insufficient time to conduct thorough reviews, and that the reviews that occurred produced little of value.[77] Because agencies were required to review all of their regulations in 90 days, some agencies had to review more than one part of the Code of Federal Regulations each day on average.[78] At some agencies, one part can contain hundreds or thousands of requirements.[79] Moreover, some agencies reported that they received large volumes of public comments concerning existing rules, which made meeting the 90-day deadline particularly difficult.[80]

---

[68] Hatch\Grassley Amendments, *supra* note 42, §627(e)(2); Roth Bill, *supra* note 56, §641(e)(2). For a description of the decisional criteria, *see supra* note 48 & accompanying text.

[69] *See supra* note 10 & accompanying text.

[70] *See supra* notes 13-14 & accompanying text.

[71] *See supra* note 21 & accompanying text.

[72] *See supra* notes 24-28 & accompanying text.

[73] *See supra* note 35 & accompanying text.

[74] *See supra* notes 39-41 & accompanying text.

[75] *Supra*, note 3.

[76] ABA Report, *supra* note 4, at 9. The order also established criteria for review and required reports on what rules were changed, including the benefits associated with those changes, and on what rules were not to be changed, including the reasons why no action was appropriate. *Id.* President Bush required agencies to consider whether: (i) the expected benefits to society of any regulation clearly outweigh the expected costs; (ii) regulations were fashioned to maximize net benefits to society; (iii) regulations adopted performance standards to the maximum extent possible; (iv) regulations incorporated market mechanisms to the maximum extent possible; and (v) regulations were sufficiently clear and certain to avoid needless litigation. *Id.* at 9-10.

[77] *Id.* at 15.

Proposed legislation that would establish an on-going government-wide process for the review of rules is a more promising approach than periodic one-shot reviews. This approach not only gives agencies more time to complete the reviews, but an agency can plan for the process because it can predict its obligations.

Congress (and the President), however, should generally refrain from mandating standardized, detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies. Past experience with legislative and presidential oversight demonstrates that micromanagement robs agencies of the flexibility they need to respond quickly and effectively to the various demands made on them[81] Moreover, as discussed below, agencies differ concerning the types and number of regulations they issue, the resources available for the review of existing regulations, and the methods of review that would be the most productive.[82] Any attempt to fit the review of existing regulations into a cookie cutter format is likely therefore to reduce the effectiveness of such reviews. In particular, tight time frames or review requirements applicable to *all* rules, regardless of their narrow scope or small impact, may prevent agencies from engaging in a meaningful effort. Finally, detailed controls appear to be unnecessary because agencies are likely to respond to general commands to engage in rule review. The ABA report found that "agencies agree that they cannot ignore the need to review their regulations and that, as a general proposition, mandatory or discretionary review of existing regulations is a sound idea, and that agencies generally attributed their failure to undertake this obligation to time and resource constraints."[83] Moreover, to the extent that agencies might not respond to a general order, because of lack of interest among agency personnel to move on to new and different challenges, or the political (or personnel) embarrassment associated with admitting that a regulation could be improved, OMB is in a position to hold them accountable.

---

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Sidney A. Shapiro, *Political Oversight and The Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

[82] *See infra* Section III.

[83] *Id.* at 14.

For these reasons, Congress should assign to the President the responsibility for overseeing that agencies comply with general guidelines that take into account agency resources and other responsibilities. This approach would give an agency sufficient flexibility to design a review process that addressed its particular situation. This approach also permits an agency to develop appropriate priorities concerning which rules to review (and in what order) in consultation with OMB and the public (including but not limited to the regulated community). Moreover, if the President and Congress consider the review of regulations to be of significant importance, they should ensure that agencies have adequate resources to conduct effective and meaningful reviews, as well as complete their other responsibilities.

The issue of deadlines illustrates why micromanagement is undesirable. One proposal would require an agency to review any major rule within five years of its promulgation and, if the agency failed to meet this deadline, the rule would no longer be in effective.[84] There are two significant difficulties with such a deadline. First, the agency is required to review a rule even if the regulated community, interested public, and the agency are satisfied with the rule. Under these circumstances, the mandated review becomes a paperwork exercise and a waste of resources. Second, the five year deadline may force an agency to devote resources to rule review that could be spend on more productive activities. For example, if an agency has dozens of rules to review, it could be forced to spend time on the review process instead of meeting other statutory responsibilities. If these other responsibilities are more important to the public, the mandate would result in a misallocation of resources. Given these difficulties, it would be better for Congress to require agencies to set their own deadlines for the review of rules (perhaps subject to some ceiling such as ten or fifteen years) and require agencies to comply with the deadlines that they set.[85]

Reform of the petition process can also improve the review of rules, but some current legislative proposals are counterproductive. The Administrative Conference has recommended that agencies establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking including establishing deadlines for notification to the petitioner of the action taken on the petition.[86] If the President or Congress determines that agencies have ignored this recommendation, the President (by executive order) or Congress (by legislation) should mandate that agencies follow it. If necessary, the President and Congress could mandate specific procedures including a requirement that an agency respond to a petition within a specific time, for example, 12 to 18 months. If specific procedures are mandated, however, the President and Congress should avoid micromanagement for the same reasons expressed earlier concerning procedures for the review process.

---

[84] *See supra* note 65 & accompanying text.

[85] *See* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 56 (1989) (proposing that Congress require OSHA to establish deadlines for rulemaking and make agency-set deadlines judicially enforceable).

[86] Administrative Conference of the United States, Recommendation 86-6, *Petitions For Rulemaking*, 51 Fed. Reg. 46989 (1986).

Some legislative proposals, however, involve such micromanagement. For example, one proposal sets a short deadline of 180 days to respond to a petition.[87] The same proposal requires an agency to engage in a preliminary assessment of the costs and benefits of any rule, interpretative rule, policy statement, or guidance, which is the subject of a petition.[88] In light of this burden, an agency is unlikely to meet the deadline without its effort having a significant adverse impact on its other activities.

The right to petition an agency to perform a cost-benefit analysis is another example of counterproductive micromanagement.[89] If Congress requires an agency to review all major existing rules, as is proposed, then an agency will have an obligation to determine whether such rules meet a cost-benefit test.[90] A requirement that an agency respond to a petition to undertake the same activity is duplicative. It is also disruptive for two reasons. First, a general requirement that an agency review existing major rules permits the agency to schedule the review of such rules in light of its other mandates. By comparison, a petitions process requires the agency to start the review process at the time it receives the petition. This difficulty is exacerbated if Congress mandates a short deadline to respond to the petition. One proposal is that an agency must respond to such a petition within 180 days.[91] Second, under a general requirement, the agency can determine the order in which it reviews existing rules. This discretion permits the agency to establish appropriate priorities. The petitions process can empower regulated entities or members of the public to determine the agency's agenda for review.[92] Moreover, an agency could find that it must stop work on other important activities in order to respond to such petitions.

Congress should not permit the petitions process to drive an agency's agenda. Agencies have broad responsibilities to respond to the needs of the public at large, and not all aspects of the public are equally equipped to file rulemaking petitions. Unless an agency has sufficient discretion to determine its own review agenda, it can not take into account the interests of members of the public who are unlikely to file rulemaking petitions.

---

[87] *See supra* note 45 & accompanying text.

[88] *See supra* notes 46, 48 & accompanying text.

[89] *See supra* note 51 & accompanying text.

[90] *See supra* notes 56-57 & accompanying text.

[91] *See supra* note 53 & accompanying text.

[92] *See* Shapiro & McGarity, *supra* note 85, at 14 (beneficiary groups dominate OSHA's agenda for rulemaking by filing rulemaking petitions).

III. The Review Process

When agencies implement a review program, they must make decisions concerning the management structure of the program, what method(s) of review to use, how to measure the success or failure of regulations, and how to obtain public input. This section considers the options available to agencies concerning each of these issues. No one set of options, however is likely to be optimal for all agencies. Because agencies differ concerning their mandates, budgets, personnel, structure, and other factors, what are promising approaches in one agency may not work successfully in another agency.

A. Management

The ABA report provides some information concerning how agencies manage review programs. Some departments and agencies have established review cycles and criteria in their operations manuals or orders. As noted earlier, DOD's review program specifies that every regulation is reviewed every two years.[93] The Department of the Interior and the Federal Deposit Insurance Corporation have established five year review cycles.[94] In addition, senior policy officials in departments and agencies meet on a frequent basis to discuss current issues including problems with existing regulations. The Federal Aviation Administration (FAA), for example, reviews daily information concerning aircraft accidents. When the FAA identified the failure to remove ice as a potential problem, it immediately held a public meeting to review existing deicing requirements. When the FAA decided that additional steps were necessary, it proposed and adopted an amendment of existing requirements before the next winter season.[95]

The ABA report also identifies key aspects of the management process. These concern appointment of a program manager, designation of a review process, solicitation of staff input, choice of review staff, and a process to choose which rules to review. This section explains these issues and makes recommendations concerning how they should be accomplished.

---

[93] *See supra* note 39 & accompanying text.

[94] *See supra* note 40 & accompanying text.

[95] ABA Report, supra note 4, at 14.

1. Appointment Of A Manager

The appointment of a senior level policy official to administer the review program is important for several reasons. The appointment signals an agency's commitment to the program, makes an agency official accountable for performance of the program, including assignment of adequate personnel and timely completion of projects, and creates an advocate for the review program within the agency to battle for necessary resources.[96]

2. Review Process

The manager of the review process should establish a process for determining when there are problems with rules.[97] The creation of a process will help ensure that the agency's staff is aware of the review program and will clarify what duties they might have. The explicit adoption of a process will also encourage an agency to think about what review process will work best.

When a review program is established, the manager will face four issues. First, how should staff input be obtained? Second, which employees will conduct the review? Third, which regulations will be reviewed and in what order? The remainder of this section discusses these aspects of the review process. Finally, what method of review should the agency use? Section IIB discusses review methodologies.

3. Staff Input

Employees who routinely work with agency regulations, such as inspectors, investigators, rule writers, policy analysts, and litigators, are in a position to identify problems with the regulations as well as potential solutions. For example, a litigator or an investigator may find that many regulated entities are not in compliance with a rule because the rule is confusing.[98] Thus, an agency needs a method to collate problems identified by its staff. The manager should designate someone who is to receive this information and ensure that it is available to those persons who are involved in the review process.[99]

---

[96] *Id.* at 22.

[97] *Id.*; VICE PRESIDENT AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: IMPROVING REGULATORY SYSTEMS 39 (1993) [cited hereinafter as the National Performance Review] ("Heads of regulatory agencies should require their staffs to check the effectiveness and workability of their programs periodically.").

[98] ABA Report, *supra* note 4, at 23-24.

[99] *Id.* at 24.

4. The Review Staff

A manager needs to decide which agency employees are to conduct reviews. Some agencies assign reviews to the staff persons who wrote the rule in order to take advantage of their expertise.[100] Other agencies assign this role to different staff to gain an independent perspective or they create an *ad hoc* team to bring in additional participants.[101] A few of these agencies have persons assigned permanently to this role.[102] In departments, a manager also has the option of asking the Inspector General to conduct a review.[103]

5. Choice of Rules

A manager will need to choose which regulations will be reviewed and on what schedule.[104] If an agency can review all of its regulations within a relatively short period of time, it will need to determine in what order the rules will be reviewed. In this situation, some agencies establish a schedule that takes them through each section or part of their regulations over a specified period of time.[105] Alternatively, an agency can review a regulation within some time period after it has been promulgated or after it has been last reviewed.[106]

Agencies, however, may not be able to review all of their regulations within such a time period. The size of the task can be one reason. As the ABA Report notes, "[o]ne agency's regulations may include over one-hundred Parts in one Title of the Code of Federal Regulations, printed on thousands of pages."[107] Competing demands for resources may be another reason. The ABA Report explains, "While many agencies are concerned about the scarcity of resources for regular systematic reviews, they generally have to find resources to review their regulations as a result of statutory changes, court decisions, resolution of policy issues, participation in international standard-setting organizations, petitions for rulemaking, changes in industry practices, and their own enforcement experience."[108] Moreover, agencies face resource conflicts because they are subject to legislative deadlines for rulemaking, or must respond to judicial remands of a regulation.[109]

---

[100] *Id.* at 17.
[101] *Id.* at 17-18.
[102] *Id.*
[103] *Id.* at 25.
[104] *Id.* at 21.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 14.
[108] *Id.* at 15.
[109] *Id.* at 18.

When faced with these conflicts, an agency can choose rules for review based on whether review is legally required, how long since a rule was last reviewed, or on the potential benefits to the public of reviewing a rule compared to the cost to the agency in time and resources.[110] In evaluating the benefits of reviewing a rule, an agency should consider whether there have been changes in administrative policy, economic conditions, technological or scientific knowledge, or in the costs and/or benefits of a rule.[111] Review of regulations might also be justified in light of litigation experiences or because there are implementation and enforcement difficulties, overlapping and duplicative rules, conflicts and inconsistencies in rules, and unnecessary and obsolete rules.[112]

For purposes of evaluating the benefits of reviewing a rule, an agency can also take into account information from the public such as complaints, rulemaking petitions to amend or repeal rules, and requests for exemptions.[113] In addition, an agency can solicit public comment concerning which rules should be reviewed.[114] Agencies could seek this information semi-annually, when they publish their regulatory agendas, or issue a periodic notice in the federal register.[115] Agencies could also hold public meetings or set up electronic bulletin boards to make it easier for the public to submit nominees for review.[116]

Although any one of the previous considerations might be sufficient to warrant a review and a decision to revise or revoke a regulation, a rule should receive a higher review priority the more reasons that exist, or the more serious is the problem that is identified.[117] For example, one request for an interpretation might indicate a potential weakness in a rule, while hundreds of requests indicate that it may be easier to amend the rule than to respond to requests for exemptions or interpretations.

In summary, good management practices are important to a review program. Agencies should assign a senior level policy official to administer the program and to ensure the commitment of appropriate personnel and resources. The manager should establish review priorities if the agency can not review all of its regulations, determine which personnel to assign to this process, and enforce appropriate deadlines for completing reviews. In addition to the previous steps, an agency needs to determine the method by which regulations chosen for review will be evaluated. The next section discusses review methods.

---

[110] *Id.* at 18, 25.

[111] *Id.* at 11.

[112] *Id.*

[113] *Id.* at 11-12.

[114] *Id.* at 30.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 10.

B. Methodology

Agencies use a variety of methods for review. Some agencies organize the review of rules by general topics, such as CFR parts, but this method may not work for all agencies The FAA, for example, was overwhelmed with 2000 public suggestions for changes when it attempted to review all of its aircraft certification regulations. Other agencies review rules by subject matter.[118] For example, the Department of Agriculture's Animal and Plant Inspection Service (APHIS) reviews its animal protection regulations by species of animal. For each species, APHIS considers various subjects such as inspection, disinfection, quarantine locations, and port destinations.[119] Still other agencies use cross-cutting reviews.[120] The Environmental Protection Agency (EPA), for example, is reviewing compliance problems in six industries. These reviews address all EPA regulations that impact on each industry.[121]

Agencies have also engaged in multi-agency efforts to improve regulations.[122] For example, the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Department of Transportation (DOT), APHIS and EPA have been reviewing the regulation of infectious substances to ensure worker protection and safety. A joint project by the Small Business Administration and OIRA is another example of this method. These agencies sponsored a "Small Business Forum on Regulatory Reform" which resulted in five industry-specific work groups consisting of governmental and industry representatives. These groups recommended increased coordination among agencies to respond to duplicative, overlapping, and inconsistent regulations.

Some agencies, however, are reluctant to engage in multi-agency review of regulations because of the potential of loss of control. They fear that they might have to go along with the majority or yield to a more powerful agency.[123] The government's experiences with the coordination of biotechnology policy confirms this difficulty. A study of that process for the Administrative Conference observed, "The lesson to be drawn...is that there are two types of interagency coordination that do not mix well. The second function — requiring common policies — is inimical to the first function — exchanging information and data — because no agency will be anxious to cooperate with a process that threatens its independence."[124] This problem, however, should not be permitted to frustrate coordination efforts. The Administrative Conference has noted concerning biotechnology, that such coordination is "critical" when agencies share regulatory responsibilities.[125] It recommended that agencies meet for purposes of fact-finding, reporting, and exchanging information.[126] If the agenda of multi-agency reviews is an exchange of information, agencies should feel comfortable to attend. Moreover, it is more likely that agencies can reach consensus in this environment concerning the elimination of unnecessary overlaps or inconsistencies.[127]

---

[118] *Id.* at 16.
[119] *Id.*
[120] *Id.* at 16-17.
[121] *Id.*
[122] *Id.* at 28.
[123] *Id.* at 27.

In summary, agencies can review regulations on an individual basis, by general topics or subject matter, or on a cross-cutting and multi-agency basis. As a general matter, the categorical approaches, such as review by general topics or specific subjects, may yield greater benefits than the review of unrelated individual regulations, but these benefits must be balanced against the extra time and increased complexity that is involved in such reviews.[128] Which categorical approach is best for a particular agency will depend on its individual circumstances. In light of the considerable variety of federal regulation, individual agencies are in the best position to determine which method is best tailored for individual situations.

Which ever of the previous methods an agency chooses, it should also engage in periodic "clean-up" reviews that address problems such as outdated references, address changes, and obsolete requirements.[129] For example, DOT identified over 70 regulations that were obsolete, redundant, or could be reissued as nonregulatory guidance as part of the review mandated by former President Bush.[130] It then issued one rulemaking document to rescind the regulations.[131]

C. Measurement

When an agency engages in one of the previous methods of review, it must determine whether a rule or a set of rules requires amendment or recession. As noted earlier, one important reason to revise or rescind a rule is that its benefits and\or costs of are different than expected.[132] To assess benefits and costs, an agency must take three steps.

---

[124] Sidney A. Shapiro, *Biotechnology and the Design of Regulation*, 17 ECOLOGY L.Q. 1, 33 (1990).

[125] Administrative Conference of the U.S., Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,493 (1989).

[126] *Id.*

[127] ABA Report, *supra* note 4, at 27.

[128] *Id.* at 27.

[129] *Id.* at 26.

[130] *See supra* note 3 & accompanying text (describing review mandated by President Bush).

[131] ABA Report, *supra* note 4, at 26.

[132] *Id.* at 23.

First, it must establish a baseline against which to measure the benefits of the rule.[133] If a rule has a clear objective, such as the mitigation of some economic or social problem, an agency will be in a better position to take this step. If an OSHA rule is intended to reduce the number of fatal accidents that occur in construction sites because of falls, for example, it can determine whether the number of such accidents has actually declined.

Second, an agency must have access to reliable information concerning the extent to which the rule has achieved its objective and at what cost.[134] Some agencies have access to statistical data bases that will provide relevant information. For example, DOT consults state accident reports or National Transportation Safety Board accident reports.[135] Such records, however, may not be entirely reliable. The Labor Department, for example, collects statistics concerning workplace accidents and diseases, but the accuracy of this data is open to question.[136]

If an agency does not have access to an existing data base, it can seek the information from private parties. Alternatively, an agency can establish a data source as part of a regulation when the rule is promulgated. DOT, for example, requires reports to be submitted to it concerning the number of positive results under drug and alcohol testing programs.[137] Both types of efforts, however, are subject to the constraints of the Paperwork Reduction Act.[138]

An agency is likely to face similar difficulties obtaining reliable information concerning costs. Unless an agency can consult an existing data base, it will probably have to obtain cost data from regulated entities. The Nuclear Regulatory Commission, for example, uses a regulatory impact survey. Under this approach, agency staff visits to licensees for the purpose of obtaining comments concerning such issues as inspections and reporting requirements. Unless such visits constitute an inspection, however, they are still subject to the constraints of the Paperwork Reduction Act.[139] In addition, there may be some question about the reliability of the data obtained because regulated entities have an incentive to calculate compliance costs as high as possible.[140]

---

[133] *Id.* at 22.

[134] *Id.* at 23.

[135] *Id.*

[136] THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 5-8 (1993).

[137] ABA Report, *supra* note 4, at 23.

[138] 44 USC §3501 (1988 & Supp. V 1993).

[139] ABA Report, *supra* note 4, at 23.

[140] Studies have found that industry projections of expected compliance costs in response to a notice of proposed rulemaking are significantly higher than actual compliance costs. *See* Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale For Technology-Based Regulation*, DUKE L.J. 729, 731 (1991).

Agencies should also obtain information about technological changes if possible. One frequently heard complaint is that regulators do not keep up with changes in the state-of-the-art.[141] For example, rules written before the computer age may not permit regulated entities to use computer technology to lower the cost of compliance.[142] In this case, regulated entities may be the best source for information concerning technological changes that impact on rules.[143]

Third, the agency has to establish cause and effect. If an agency finds that a problem has become better, for example, the change may not be attributable to a regulation. For example, although the Consumer Product Safety Commission attributes the reduction in the number of children who are accidentally poisoned to its regulation that requires child-proof caps for medicines, another analyst claims that there is no such association.[144] Similarly, studies disagree concerning the extent to which safer workplaces can be attributed to OSHA safety regulations.[145] The impact of a rule can be even more difficult to determine when the benefits of the rule are indirect, such as rules requiring content labeling or warning labels on food or drugs.[146]

Although some agencies, such as the National Highway Traffic Safety Administration (NHTSA), have policy offices that develop information and conduct studies concerning the impact of existing regulations,[147] many agencies do not have such programs.[148] As noted earlier, however, the GPRA may compel all agencies to undertake this activity.[149]

Whether or not the GPRA compels agencies to develop measurement methods, it is an important element in a program to review existing regulations. Agencies should establish methods to measure the success or failure of regulations, and to obtain the information necessary to make such assessments, including information on costs, benefits, and changes in technology.

---

[141] ABA Report, *supra* note 4, at 23.

[142] *Id.*

[143] *Id.*

[144] *See* Gregory B. Rodgers, Directorate for Economic Analysis, U.S. Consumer Product Safety Commission, The Safety Effects of Child-Resistant Closures (May 1992) (finding an association between regulation and decline in injuries and describing a study that found no such association).

[145] *See* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *supra* note 136, at 10-13 (describing studies of the impact of OSHA safety regulations).

[146] ABA Report, *supra* note 4, at 23.

[147] *E.g.*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Evaluation Program Plan 1994-1998 (May 1994).

[148] ABA Report, *supra* note 4, at 16.

[149] *See supra* notes 16-23 & accompanying text.

D. Public Input

Any program of review requires public input to be successful. As the ABA Report notes, "[I]f those subject to the regulations are having difficulty implementing them because the rules are confusing, because they are most costly than the government thought, or because they conflict with other regulations, the government needs to know this."[150]

Agencies receive public input in routine activities, such as enforcement and litigation,[151] and from rulemaking petitions to amend or rescind a rule.[152] Yet, these sources may not be sufficient. Some members of the public may not understand how to contact an agency with complaints or comments, or that they can file a rulemaking petition. Moreover, agencies have found that persons who file rulemaking petitions often do not provide sufficient information.[153] In addition, many persons with complaints apparently go to Congress with their problems because they assume that the agency will be unresponsive.[154] In response to such problems, some agencies have adopted detailed procedures for rulemaking petitions which attempt to structure this process to make it more accessible to the public and more useful to the agency.[155] For example, the FAA publishes petitions for public comment to attempt to obtain the input of potentially opposing parties.[156]

Agencies are proactive in seeking public input in other ways. They may request information in the *Federal Register* or the *Semiannual Regulatory Agenda*.[157] The notice may be a general notice requesting information, an advanced notice of proposed rulemaking (ANPR), or a notice of proposed rulemaking.[158] The request for information can be a general invitation for information concerning any of an agency's rules, or the agency can focus its request on specific rules.

Agencies who rely on routine general requests for information have found that they have had few responses.[159] The general nature of these requests is apparently one reason for the lack of response.[160] As discussed below, agencies have had more success with focused requests for information.[161] A second problem is that the comments that are received are often of little value.[162] These comments concern proposed regulations rather than existing rules, recommend changes with little or no merit, or propose changes that the agency does not have the authority to make. In addition, comments often do not provide any supporting data, although agencies can address this problem by requesting additional information.

---

[150] ABA Report, *supra* note 4, at 29-30.
[151] *Id.* at 15.
[152] *See supra* note 13-14 & accompanying text.
[153] ABA Report, *supra* note 4, at 15.
[154] *Id.* at 15.
[155] *See, e.g.*, Food and Drug Administration, 21 CFR §§10.20, 10.25, 10.30, 10.40 (1994).
[156] ABA Report, *supra* note 4, at 31.
[157] *Id.* at 15, 20.
[158] *Id.* at 20.
[159] *Id.* at 15.
[160] *Id.*
[161] *See infra* notes 163-68 & accompanying text.

Some agencies rely on focused requests for information because of the previous problems.[163] For example, they request information concerning a particular regulation or area of regulation in the *Federal Register*. When the Departments of Transportation and Agriculture took this step in response to President Bush's order to review existing regulations,[164] they received a large number of useful comments.[165] When agencies use focused requests for information, they also include specific questions to draw attention to potential problem areas.[166] The FAA, for example, asked the public to identify the top three rules that they believed required review.[167] Some agencies have found that a focused approach yields a better response if they take additional steps, such as a press release, to draw attention to a request.[168]

Agencies use advisory committees as a third method to acquire public input.[169] As a general matter, advisory committees can be a valuable resource for an agency.[170] In rule review, committees can help identify problems with rules and gather information.[171] The Food and Drug Administration (FDA), for example, invited public comment on which regulations should be reviewed and then it asked its advisory committees to help evaluate those recommendations.[172] The advisory committee process is subject to two limitations, however. First, agencies must comply with the Federal Advisory Committee Act (FACA).[173] Some agencies believe that the requirements imposed by FACA hamper public participation.[174] Second, Executive Order 12838 prohibits the formation of new advisory committees except where "compelling considerations" require the formation of a committee.[175]

---

[162] ABA Report, *supra* note 4, at 15.
[163] *Id.*
[164] *See supra* note 3 & accompanying text (describing President Bush's mandate).
[165] ABA Report, *supra* note 4, at 30.
[166] *Id.* at 16.
[167] *Id.* at 30.
[168] *Id.* at 15-16.
[169] *Id.* at 16.
[170] *See* Shapiro & McGarity, *supra* note 85, at 35 (describing advantages of advisory committees).
[171] ABA Report, *supra* note 4, at 16.
[172] *Id.* at 30.
[173] 5 USC App. §1.
[174] ABA Report, *supra* note 4, at 19.

Finally, agencies use fact-finding hearings or meetings to gather information.[176] The Department of Labor, for example, has been successful in holding informal, fact-finding hearings where it asks for ideas for changes.[177] Agencies have also found it useful to schedule meetings between regulated entities and/or beneficiaries and agency staff responsible for the implementation and enforcement of rules.[178] These approaches have the advantage that they do not fall under the requirements of FACA if the agency is not seeking advice from the participants.[179] The persons who participate, however, may not have the same level of expertise as members of an advisory committee.

As the previous discussion suggests, agencies can structure the process of obtaining public input in ways that will increase the quality of the information that is received. Even if the process does not usually produce useful information, agencies should still actively seek public input.[180] As the ABA report explains, "Rules can be more effectively implemented if the public is willing to accept them, and the public is generally more willing to accept rules if they have an opportunity to be heard concerning any problems and believe that these problems have been considered in a reasonable manner."[181] At the same time, legitimacy is related to whether an agency meets behind closed doors with persons or groups on only one side of an issue.[182] Unless an agency speaks with all stakeholders, the consultation process is not likely to be considered legitimate.

In light of the prior discussion, an agency can take several steps to obtain good public input. First, it can appoint a person to receive public comments.[183] When a rule is published in the *Federal Register*, for example, it can provide the name and telephone number of a person to contact if members of the public have any problems with the implementation of a rule.[184] An agency can also designate an ombudsman to receive public comments or complaints. If the ombudsman has more independence or authority than a person who is designated to receive comments, this approach may be a better alternative. ACUS has concluded that agencies that administer programs with major responsibilities involving significant interactions with members of the general public are likely to benefit from establishing an ombudsman service.[185]

---

[175] Termination and Limitation of Federal Advisory Committees, Exec. Ord. 12838, §3a, 3 CFR §590 (1993 Comp.).

[176] ABA Report, *supra* note 4, at 16.

[177] *Id.* at 30.

[178] *Id.*

[179] Note 173 *supra.*

[180] ABA Report, *supra* note 4, at 30.

[181] *Id.* at 30.

[182] National Performance Review, *supra* note 97, at 39.

[183] *Id.* at 24.

[184] *Id.*

Second, an agency is more likely to obtain useful information if it periodically seeks out public input.[186] An agency can request information in its Regulatory Agenda or in the *Federal Register*, or it can use such methods such as press releases.[187] Experience has shown that the quality of public input improves when an agency asks specific questions and requests supporting data.[188] An agency is also more likely to get useful responses if it sets up an electronic bulletin board to make it easier to submit information.[189] An agency can also use focus groups or consumer surveys.[190] The National Performance Review recommends that OIRA should work with agencies to make it easier for them to obtain clearance under the Paperwork Act when surveys are used for the purpose of reviewing existing regulations.[191]

Third, although increased public participation is an important goal, the National Performance Review warns that "granting access behind closed doors to interest groups representing only one side of an issue creates major problems."[192] An agency therefore should "take care…to allow access by a wide group of interests and to ensure that all truly affected groups are represented in formal and informal negotiations."[193] Moreover, "[d]ocketing of contacts with outside parties should also be addressed."[194]

Fourth, agencies can consult advisory committees and hold public meetings to obtain public input.[195] This approach may be particularly useful to follow up on comments received from the public concerning which regulations should be reviewed.[196]

Fifth, agencies can improve the petition process by following the ACUS recommendations on rulemaking petitions,[197] which were endorsed by the National Performance Review.[198] The Administrative Conference recommends that agencies establish by rule procedures for the receipt, consideration, and prompt disposition of petitions. These procedures should include specification of where to file petitions, the recommended contents of petitions, and the prompt notification of petitioners of the action taken with a summary explanation statement. In addition, the Conference recommends that, where feasible and appropriate, agencies should provide guidance on the type of data, argumentation, and other information that the agency needs to consider petitions, develop effective methods to provide notice to interested persons that a petition has been filed, invite comments on the petition, and establish internal management controls to assure timely consideration and disposition of petitions.

---

[185] Administrative Conference of the U.S., Recommendation 90-2, *The Ombudsman in Federal Agencies*, 55 Fed. Reg. 34211 (1990).

[186] *See supra* notes 159-62 & accompanying text.

[187] *See supra* note 163-68 & accompanying text.

[188] *See supra* note 166 & accompanying text.

[189] ABA Report, *supra* note 4, at 30.

[190] National Performance Review, *supra* note 97, at 39.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See supra* notes 170, 176 & accompanying text.

[196] *See supra* note 178 & accompanying text.

[197] Administrative Conference of the U.S., Recommendation 86-6, *Petitions For Rulemaking*, 51 Fed. Reg. 46988 (1986).

[198] National Performance Review, *supra* note 97, at 44.

The ABA Report also encourages an agency to encourage peer review of a petition before it is filed.[199] Under this approach, petitioners would talk with other interested parties in an attempt to develop a consensus position before submitting a petition. If consensus were reached, the agency's consideration of the petition would likely be expedited.

Finally, an agency can take steps to ensure that the public understands how the rulemaking process works. It can provide training courses or develop other educational materials for the public which explain the procedural requirements for rulemaking, the opportunities to provide information to the agency, and the process for submitting a rulemaking petition.[200] It can also consider educating the public concerning the various rulemaking requirements which might help the public appreciate the difficulty of changing rules even when such changes may be warranted.[201]

IV. Reducing The Need For Rule Revisions

Amending or rescinding a rule can create the same resource and time burdens on an agency as the adoption of a regulation.[202] For this reason, the public would benefit if agencies can reduce the need to revise regulations after they are promulgated. An agency can take three steps to accomplish this objective. First, it can adopt rules that are less likely to become obsolete or pose similar problems. Second, it can adopt interim final rules in appropriate circumstances. Third, it can rely to a greater extent on formal interpretations to adjust rules in light of their impact. This section describes and evaluates these alternatives.

---

[199] ABA Report, *supra* note 4, at 31.

[200] *Id.* at 32.

[201] *Id.*

[202] Sidney A. Shapiro, *Rethinking Environment Change: Policy Instruments and Adaptability To Change* 2-9 (Oct. 12, 1991) (Paper for Office of Technology Assessment) (describing impact rulemaking constraints on revision of existing regulations).

A. More Flexible Regulations

The flexibility of a regulation depends on the extent to which it has to be changed in response to a change in circumstances and to how easily it can be changed if necessary. An agency can take four steps to make its regulations more flexible. It can promulgate performance standards, design standards that permit equivalent methods of compliance to be used, rules that automatically adjust, and consensus standards.

The use of performance standards will make it less necessary for agencies to revise some regulations.[203] A performance standard states a regulatory obligation in terms of some ultimate goal that must be achieved. Unlike a design standard, it does not specify the use of a particular technology or method.[204] As a result, regulated entities are free to achieve the regulatory goal in any appropriate way. For this reason, a regulated entity can adopt a less expensive or more effective method of achieving the regulatory goal without any change in the regulation. By comparison, if an agency specifies a particular design, the regulated entity must use that design until the agency amends its regulation to permit use of some other technique.[205]

If an agency promulgates a design standard, it can make it more flexible by permitting regulated entities to adopt a method of compliance that is the equivalent of the technology required by regulation. Where appropriate, an agency can designate an official who has the authority to accept equivalent compliance with the rule in lieu of compliance with the exact requirements of the regulation.[206] For example, an environmental regulation could give regulated entities the option of adopting a technology specified in the regulation or another technology, but the entity would have the burden of establishing that the alternative would provide the same level of pollution protection.[207]

An agency can also adopt rules that contain standards for automatic adjustments to a change in circumstance.[208] For example, an agency could require dollar amounts specified in a regulation to increase automatically in accordance with the rate of inflation as measured by government statistics. The agency could publish a notice in the *Federal Register* advising the public of the new amount.[209]

---

[203] ABA Report, *supra* note 4, at 28; *see* Administrative Conference of the U.S., Recommendation 87-10, *Regulation By The Occupational Safety and Health Administration*, 52 Fed. Reg. 49147 (1987) (recommending that OSHA should generally make greater use of performance standards).

[204] STEPHEN BREYER, REGULATION AND ITS REFORM 105 (1982).

[205] *Id.*

[206] ABA Report, *supra* note 4, at 29.

[207] Shapiro, *supra* note 202, at 17.

[208] ABA Report, *supra* note 4, at 28.

[209] *Id.*

Finally, an agency can adopt as its regulations appropriate voluntary standards established by consensus-setting organizations.[210] An agency may initially be able to adopt such standards more quickly than conventional regulations because of their consensus nature. Members of the organization that that produced the voluntary standard are less likely to challenge it than a conventional regulation.[211] If the organization subsequently makes changes in its voluntary standard, an agency might find it easier to adopt the revision for the same reason. In addition, an agency might be able to use "direct final" rulemaking to adopt the revisions. The potential benefits of direct final rulemaking are discussed in the next section.[212]

B. Interim Final Rules

Use of interim final rules may also reduce the need to revise regulations.[213] After an agency promulgates a final rule, it can announce that it will review the regulation after some period of time elapses. The agency can also invite public comments concerning the rule in the meantime. When an agency takes these steps, the regulation is described as an "interim final rule." The Administrative Conference has sponsored a study of interim final rules.[214]

An agency could use this approach when it has concerns about potential implementation problems, or when it simply wants to be assured that no such problems exist.[215] If the agency combined an interim final rule with an extensive comment period, such as one or two years, it might find that revision of the rule is easier. The interim status of the rule might encourage more public comment than if the rule was promulgated in a conventional manner. In turn, this information may make it easier for the agency to determine whether the rule required revision, and if it did, how it should be changed.[216]

If an agency does not amend or rescind an interim final rule, it remains in effect as promulgated. If an agency prefers, it can give a regulation actual interim effect by placing a "sunset" date in the regulation.[217] A rule with a sunset provision might have two advantages.[218] First, it forces the agency to evaluate the rule within a specific time framework. Second, it sends a stronger message to the public that the agency is concerned about the implementation of the rule. This message may prompt better public input concerning how well the regulation works. The adoption of a regulation with a sunset provision, however, may not work in many circumstances. For example, the agency may find itself adopting a new rule at a time when it has other pressing business. Moreover, the agency would have this obligation even if the original regulation did not require any changes. In addition, the public may find it difficult to plan if a rule is only effective for a limited number of years.

---

[210] *Id.* at 28; *see generally* Ernest S. Rosenberg, *Emerging Issues in Standards and Industry Self-Regulation* in PROTECTING THE CONSUMER INTEREST: PRIVATE INITIATIVE AND PUBLIC RESPONSE 141 (Robert N. Katz ed. 1976).

[211] *See, e.g,* JOHN MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCES REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA (1988) (arguing that OSHA's adoption of consensus standards would speed up rulemaking); *but see* Shapiro & McGarity, *supra* note 85, at 736-39 (contesting Mendeloff's argument).

[212] *See infra* Section V.

[213] ABA Report, *supra* note 4, at 29.

[214] Michael Asimow, Interim-Final Rules (March 1995 draft).

[215] ABA Report, *supra* note 4, at 29.

[216] *Id.*

[217] *Id.*

C. Interpretation of Rules

Finally, if an agency does not have a program for interpretation of regulations, adoption of such a program can reduce the number of regulations that have to be revised. Interpretive rules permit an agency to advise the public of the construction of regulations that the agency administers.[219] Similarly, policy statements allow an agency to advise the public of the manner in which an agency proposes to exercise a discretionary power.[220] Because interpretive rules and policy statements do not require notice and comment rulemaking,[221] they can be a more expeditious way to adjust the impact of regulations than the promulgation of a legislative rule.

Agencies that issue interpretations should ensure that these rules (and other policy guidance) are collected in one place and are accessible to the public.[222] Agencies could also increase the availability of this information by giving electronic access to the public.[223] Because these steps should reduce confusion about existing regulations, they might reduce the need to review existing regulations.[224]

V. More Efficient Rulemaking

Agencies can take steps to reduce the need to revise regulations. If, however, rules are to be revised, an agency would benefit from a more efficient rulemaking process. The Administrative Conference, the National Performance

---

[218] *Id.*

[219] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 54 (2nd ed. 1991).

[220] *Id.*

[221] 5 USC §553(b)(A).

[222] National Performance Review, *supra* note 97, at 25.

[223] *Id.* at 39; ABA Report, *supra* note 4, at 25.

[224] ABA Report, *supra* note 4, at 25.

Review, and the ABA, among others, have made suggestions to improve this process. These steps include better rulemaking management, use of direct final rules, and improved coordination of executive and legislative oversight. This section reviews these recommendations and their potential benefit for revising or rescinding rules.

A. Management

A more efficient rulemaking process would have two advantages concerning the review of existing regulations. If an agency's review process identifies regulations to amend or rescind, it can more quickly take those steps. In addition, if rulemaking is more efficient, an agency might free up resources that can be used for regulatory reviews.[225]

The Administrative Conference and the National Performance Review have recommended a number of steps that agencies could take to improve their management process.[226] First, an agency should develop strategies to set priorities.[227] Its strategy should cover both the adoption of new rules and the amendment or recision of existing regulations. Second, an agency should set and enforce deadlines concerning the development and promulgation of rules.[228] If it has a tracking system for this purpose,[229] it can integrate management of new rulemaking initiatives and the amendment or recision of existing regulations. It can also integrate deadlines for completion of the review of existing regulations to determine if they require revision or recision.[230] Third, an agency will benefit from the elimination of bottlenecks and other similar delays.[231] For example, it can obtain more rapid internal clearances of proposed and final rules by eliminating clearance by officials whose approval is unnecessary or inappropriate.[232] It can also develop training courses to lessen delays caused by mistakes.[233] Finally, an agency can reward innovative managers and personnel for making improvements in the rulemaking process.[234] Because the review and revision of existing regulations will impose additional resource burdens on an agency, it will benefit from innovation in this area.[235]

---

[225] *Id.* at 25.

[226] Administrative Conference of the U.S., Recommendation 93-4, *Improving the Environment For Agency Rulemaking*, 59 Fed. Reg. 4669, 4672 (1993).

[227] *Id.*

[228] *Id.*

[229] *See* Administrative Conference of the United States, Recommendation 87-1, *Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration*, 52 Fed. Reg. 23629 (1987) (recommending OSHA should establish a computer status system to set and track deadlines for rulemaking); ABA Report, *supra* note 4, at 33.

[230] *See supra* Section IIIA (recommending that an agency should establish and enforce deadlines to complete the review of existing regulations).

[231] Recommendation 93-4, *supra* note 226, at 4672; National Performance Review, *supra* note 97, at 43; ABA Report, *supra* note 4, at 32.

[232] Recommendation 93-4, *supra* note 226, at 4672; National Performance Review, *supra* note 97, at 43-44; ABA Report, *supra* note 4, at 33.

[233] ABA Report, *supra* note 4, at 33.

B. Direct Final Rules

Better management can speed up the rulemaking process and make additional resources available for the review of existing regulations. An agency should also consider the use of direct final rules to revise or revoke existing regulations.[236] For a direct final rule, an agency publishes a notice in the *Federal Register* that the rule will become effective in a specified number of days (such as 60 days) unless a member of the public objects. The notice indicates that if anyone notifies the agency within some specified period of time (such as 30 days) of an intention to file adverse or negative comments on the rule, the regulation will not take effect. Instead, the agency will republish the rule as a proposed rule, and it will go through the usual notice and comment procedure.[237] The Administrative Conference has undertaken a study of the potential of direct final rules.[238]

This process might be particularly advantageous for making noncontroversial changes to existing regulations. For example, an agency could use this approach for deleting obsolete regulations or for fixing "clear" mistakes in other regulations.[239] If there were no objections, the agency would have saved the time it otherwise would have spent on a comment period. An agency, however, must be careful not to use this process if it is likely to receive adverse comments. In this case, use of the process will slow adoption of revised regulations.

C. Executive Oversight

An agency's capacity to revise or rescind existing regulations may be impacted by executive oversight. If an agency must meet burdensome analytical requirements to obtain OMB's approval to revise or revoke the rule, the agency's final action will be delayed. The Administrative Conference recently renewed its endorsement of OMB's coordination of rulemaking as beneficial and necessary.[240] At the same time, the Conference recommended that the OMB's program "should be sensitive to the burdens being imposed on the rulemaking process, and implementation of the program should ensure that it does not unduly delay or constrain rulemaking."[241]

---

[234] *See* National Performance Review, *supra* note 64, at 97 (recommending improved incentives for rulemaking staff).

[235] *Id.*

[236] Recommendation 93-4, *supra* note 226, at 4673; National Performance Review, *supra* note 97, at 44; ABA Report, *supra* note 4, at 33.

[237] National Performance Review, *supra* note 97, at 44.

[238] *See* Ronald Levin, Direct Final Rulemaking (Mar. 1995 Draft).

[239] ABA Report, *supra* note 4, at 33.

Congress, as well as the President, determines what rulemaking analyses agencies must perform and submit to OMB. Pending legislation would increase the analytical burdens that agencies must undertake subject to OMB supervision, although some bills make a distinction between regulatory and deregulatory initiatives.[242] Thus, legislative developments may also affect how easily agencies can amend or rescind rules. The ABA has urged the President and Congress "to exercise restraint in the overall number of required rulemaking impact analyses [and] access the usefulness of existing and planned analyses...."[243]

D. Congressional Coordination

The National Performance Review identified improvements in agency and Congressional relationships as an important step in making rulemaking more efficient.[244] It recommended that agencies work with Congress to write legislation as a method of avoiding unintended consequences.[245] If implementation problems can be avoided by better drafting, there may be less need for agencies to revise regulations.

The ABA Report recommends that agencies make Congress aware of how resource limitations will impact on the process of reviewing existing regulations.[246] For example, agencies can periodically brief legislative staff concerning areas they are considering reviewing, the potential benefits they expect, and the resources available for this effort.[247]

---

[240] Recommendation 93-4, *supra* note 226, at 4671.

[241] *Id.* at 4673. The Conference also recommended that the "President should consider the cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones. *Id.*

[242] *See supra* section IIA4.

[243] ABA Resolution, Rulemaking Analyses Requirements (August, 1991).

[244] National Performance Review, *supra* note 97, at 65.

[245] *Id.* at 67.

[246] ABA Report, *supra* note 4, at 33.

[247] *Id.*

Report for Recommendation 95-4

An Introduction to Direct Final Rulemaking

Ronald M. Levin
Professor of Law
Washington University

This report was prepared for the consideration of the Administrative Conference of the United States. This and the following report by Michael R. Asimow are in support of Recommendation 95-4. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

INTRODUCTION 447

I. INITIAL EXPERIENCE WITH DIRECT FINAL RULEMAKING 449
   - A. Environmental Protection Agency 449
   - B. Department of Agriculture 452
   - C. Department of Transportation 453

II. THE LEGALITY OF DIRECT FINAL RULEMAKING 455
   - A. Direct Final Rulemaking and the Good Cause Exemption 456
   - B. Direct Final Rulemaking as Notice-and-Comment Rulemaking 461
     - 1. Notice and opportunity for comment 461
     - 2. Publication of Rule and Statement of Basis and Purpose 463
   - C. The Issue of Preparation Time 464

III. USING DIRECT FINAL RULEMAKING 468
   - A. The Decision to Use Direct Final Rulemaking 469
   - B. Regularization of Direct Final Rulemaking Procedures 470
   - C. The Length and Purpose of the Comment Period 470
   - D. The Definition of "Adverse Comment" 472
   - E. Confirmation Notices 474
   - F. Length of Time Allowed Before Rule Becomes Effective 476

IV. RECOMMENDATIONS AND CONCLUSION 476

Introduction

"Direct final rulemaking" is a variation on the normal notice-and-comment model of informal rulemaking prescribed by section 553 of the Administrative Procedure Act (APA).[1] To use this procedure, an agency publishes a rule in the Federal Register with a statement that the rule will become effective in sixty days unless, within thirty days, the agency receives an adverse comment or written notice that someone intends to submit an adverse comment. (The figures sixty and thirty may vary, but they are the most common time periods used.) If even one person files such an adverse comment or notice, the agency must withdraw the rule. Typically it will then immediately republish the substance of the direct final rule as a proposed rule, thus initiating the ordinary notice-and-comment process.

The purpose of the direct final rulemaking technique is to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be adequate. It is intended to enable the agency to avoid two rounds of deliberation on the rule — once at the proposal stage and once at the final promulgation stage. To date, direct final rulemaking has been little publicized and therefore little used, but the climate is right for a considerable expansion in its use. In an era in which the rulemaking process has been criticized as too cumbersome[2] and in which most agencies face the prospect of living under more severe resource constraints than they have experienced in the past, administrators have strong reasons to take note of the efficiencies that direct final rulemaking offers.

In fact, this technique has already received favorable attention from influential voices in the executive branch. It was highlighted in *Improving Regulatory Systems*, one of the reports accompanying the National Performance Review or "reinventing government" effort led by Vice President Al Gore.[3] The authors of that report urged each regulatory agency to consider making use of direct final rulemaking during the coming year. The Administrative Conference of the United States (ACUS), in its recent recommendation on "Improving the Environment for Agency Rulemaking,"[4] also urged agencies to consider the possible advantages of direct final rulemaking.[5] The present study builds on those pronouncements and other words of praise,[6] by outlining a legal and practical framework within which direct final rulemaking can flourish.

---

[1] 5 USC § 553 (1988).

[2] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on De-Ossifying the Rulemaking Process*, 42 DUKE L.J. 1385 (1992). Even the Supreme Court, referring to what has traditionally been called *informal* rulemaking, now speaks of "the time-consuming rulemaking process." Shalala v. Guernsey Mem. Hosp., 115 S. Ct. 1232, ___ (1995).

[3] *See* OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 42-44 (1993) [hereinafter IMPROVING REGULATORY SYSTEMS]. The team leader for this report was Jeffrey Lubbers, who is also Research Director of ACUS. *See also* Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1166-70, 1173 (1994) (elaborating on and giving background of recommendation).

Direct final rulemaking should be distinguished from "interim final rulemaking," another policymaking technique that is less elaborate than the usual notice-and-comment process for developing regulations. When an agency uses interim final rulemaking, it adopts a rule without prior public input, makes it immediately effective, and then invites post-promulgation comments directed towards the issue of whether the rule should be changed sometime in the future.[7] Both techniques generally presuppose that the agency can rely on an APA exemption, such as the "good cause" exemption,[8] as a basis for not engaging in prior notice and comment proceedings.[9]

Although the resemblance between direct final rulemaking and interim final rulemaking may sometimes have led to confusion,[10] they differ in that the latter is generally used because of some felt urgency in instituting a regulation immediately. It frequently involves regulations that are deeply controversial; the agency solicits comment for its own edification or to identify possible bases of legal challenge, but will not alter the rule unless the comment *persuades* it to do so. The situation is thus quite distinct from that of direct final rulemaking, in which the agency undertakes to withdraw its rule if *anyone* objects. The agency is gambling that no one will. Such a scenario is unlikely in the case of a regulation that is considered urgent enough to *need* immediate effectiveness.

---

[4] Recommendation No. 93-4 of the Administrative Conference of the United States, "Improving the Environment for Agency Rulemaking," 59 Fed. Reg. 4670 (1994).

[5] *See id.* at 4673 ("[A]gencies should ... consider the use of 'direct final' rulemaking where appropriate to eliminate double review of noncontroversial rules.")

[6] *See* John Donnelly, *FSIS Streamlines Routine Rule-Making*, Food & Drink Daily, July 7, 1994, quoting food industry lawyers who hailed the advent of direct final rulemaking at the Food Safety and Inspection Service as a needed corrective to torpid decisional processes and a spur to innovation in their industry. The same article also quotes an FSIS official as saying the approach "is in everybody's interest. It just saves time."

[7] *See* Michael Asimow, *Interim-Final Rules* (forthcoming). A draft recommendation scheduled for consideration by ACUS in June 1995 would endorse the term "post-promulgation comment rules" as a more straightforward name for such rules.

[8] *See* 5 USC § 553(b)(B) (1988).

[9] Direct final rulemaking, however, may sometimes be defensible as constituting substantial compliance with the APA notice-and-comment procedures. *See infra* Part II.B. This would seldom if ever be true of interim final rulemaking.

[10] For example, the Environmental Protection Agency (EPA) published a regulation requiring that off-highway diesel fuel be dyed red, so that it would not be confused with aviation fuel, which is blue. The published statement accompanying the regulation described it (accurately) as an interim final rule. 59 Fed. Reg. 35,854 (1994). Later, however, in its semiannual regulatory agenda, EPA called the regulation a direct final rule. 59 Fed. Reg. 58,200, 58,300 (1994).

Part I of this study reports on the agencies' initial experience with direct final rulemaking. Part II explores the strength of the legal case for an agency's authority to use this approach to rulemaking. Part III then discusses policy choices that agencies must make regarding the circumstances in which they will use direct final rulemaking and the manner in which they will do so.[11]

I. Initial Experience with Direct Final Rulemaking

To provide a factual context for analysis, we shall first review the manner in which direct final rulemaking has been implemented by the federal agencies that have already made use of it.

A. Environmental Protection Agency

The Environmental Protection Agency invented direct final rulemaking in the early 1980's. The agency had encountered numerous complaints about the slow pace of its process for approving revisions to "state implementation plans" (SIPs) under the Clean Air Act.[12] As part of a package of measures designed to speed up the process, EPA began using direct final rulemaking in 1981.[13] The agency explained why the SIP revision process seemed to lend itself well to this device: "Because of the straightforward nature of some actions, or the narrowness of their scope, many SIP revisions get few, if any, comments from the public during the comment period."[14]

After six months' experience, the agency reported that it had needed to withdraw fewer than five percent of the ninety SIP revisions it had processed during this period using the direct final rulemaking approach.[15] Moreover, the new system had enabled the agency to process SIP revisions in considerably less than half the time that had been required for processing of a similar group of noncontroversial SIP revisions prior to the experiment.[16] Accordingly, EPA decided to utilize direct final rulemaking whenever possible[17] and has done so nationwide for over a decade.[18]

---

[11] The *Improving Regulatory Systems* report appeared to assume that the process of direct final rulemaking does not entail publication of a "confirmation notice," in which the agency announces that a direct final rule has gone into effect because no adverse reactions were received. *See* IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 46 n.16. Because agency practice varies in this regard, the present study assumes that the term "direct final rulemaking" can apply regardless of whether the agency issues a confirmation notice. It treats the desirability of that step as a question for analysis. *See infra* Part III.E.

[12] 47 Fed. Reg. 27,073, 27,073 (1982).

[13] *See* 46 Fed. Reg. 44,476 (1981). At that time, EPA called the device "immediate final rulemaking." *Id.* at 44,477.

[14] *Id.* at 44,477.

[15] 47 Fed. Reg. at 27,074.

[16] *Id.* (stating that SIP revisions handled through direct final rulemaking had required an average of 181 days for processing; the comparison group had required an average of 419 days).

In 1989 EPA announced that it would begin regular use of direct final rulemaking in a second context: promulgation of "significant new use rules" (SNURs) issued under the Toxic Substances Control Act.[19] SNURs are used to impose controls on new chemical substances that may pose hazards to health or the environment. The agency predicted that it would usually employ direct final rulemaking in promulgating these rules because "EPA does not generally anticipate public comment on these SNURs."[20] Experience with the process has also been successful: "SNURs for at least a hundred chemicals have been issued as direct final rules."[21]

Up to a point, the procedures EPA uses for direct final rulemaking in these two contexts are identical.[22] The agency allows 30 days for comments after publication of a direct final rule; the rule goes into effect 60 days after publication of the notice if no one gives written notice within the comment period of an intention to submit adverse or critical comments. EPA will issue a second notice if it *withdraws* a direct final rule after receipt of an objection, but it does not publish anything to announce that a direct final rule *will* go into effect.

Since May 1994, however, EPA's direct final rulemaking procedure for issuing SIPs has differed slightly from its past approach.[23] Now, when EPA publishes a direct final rule to establish a SIP, it simultaneously launches a conventional rulemaking proceeding regarding the same rule by publishing a notice of proposed rulemaking. If no one objects to the rule, the latter notice is simply forgotten; if the agency receives one or more adverse comments, it withdraws the direct final rule and continues with the rulemaking process on the basis of the comment(s) it has already received. When using this model, EPA informs members of the public that if they wish to comment on the rule, they should do so forthwith (during the thirty-day period after the direct final rule is announced), because the agency does not intend to provide an additional comment period later. EPA has not extended this variation on the direct final rulemaking model to SNURs.[24] Thus, if the agency withdraws a SNUR direct final rule due to opposition from a member of the public, it will ordinarily issue a notice of proposed rulemaking at *that* time, thus providing the public with a second comment period.

---

[17] *Id.*

[18] IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43.

[19] 54 Fed. Reg. 31,298 (1989). The rules are codified at 40 CFR §§ 721.160(c)(3), .170(d)(4)(i) (1994). *See also EPA Issues "Generic" Rule; May Issue Many Use Rules in Next Year, Official Says*, Daily Rep. for Execs. (BNA), July 31, 1989 (background to rules).

[20] 54 Fed. Reg. at 31,299.

[21] IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43.

[22] 54 Fed. Reg. at 31,299.

[23] *See* 59 Fed. Reg. 24,054 (1994) (explaining new direct final rulemaking procedure for SIPs).

[24] *See* 60 Fed. Reg. 11,033 (1995) (announcing SNUR direct final rule without a parallel notice of proposed rulemaking).

EPA has also used direct final rulemaking to issue individual regulations in other areas. In these areas, it has not relied on any prior policy statement providing for the use of this technique under specified circumstances; it has simply announced in the statement accompanying the rule that the agency would use direct final rulemaking because it expected that the rule would be noncontroversial and that no one would submit adverse or critical comments.

One such instance involved amendments to EPA's recent regulation on reformulated gasoline. Direct final rulemaking would not have worked for the underlying regulation, which involved a complex regulatory negotiation, followed by a public uproar over EPA's adoption of a rule that differed from the negotiated agreement, and ultimately a successful appeal in court.[25] Five months after the issuance of that regulation, however, EPA used direct final rulemaking to make minor corrections to it.[26] Interestingly, when the agency received adverse comments, it did not withdraw the entire direct final rule. Treating the items in the rule as severable, it withdrew only those specific items that had triggered dissent, letting the others stand.[27]

Another recent exercise in direct final rulemaking, not yet final, involves notices of written exemptions from the acid rain program permitting and monitoring requirements for sixty-five industrial facilities in ten states.[28] Again, the agency contemplates severability: if it receives adverse comments on any exemption, EPA intends to withdraw only that exemption, not the entire rule.[29]

In sum, EPA has had lengthy and for the most part successful experience with its use of direct final rulemaking. It is overwhelmingly the principal user of the technique in the federal government.[30] Moreover, the agency apparently plans to make wider use of this approach in fresh contexts in the near future.[31]

---

[25] American Petroleum Inst. v. USEPA, No. 94-1502, 1995 U.S. App. Lexis 9676 (D.C. Cir. Apr. 28, 1995).

[26] *See* 59 Fed. Reg. 36,944 (1994) (initial announcement of rule).

[27] 60 Fed. Reg. 6030 (1995) (partial withdrawal of rule).

[28] 60 Fed. Reg. 4413 (1995).

[29] *See also, e.g.*, 60 Fed. Reg. 17,950 (1995) (establishing permit application process for storm water dischargers under Clean Water Act; rule will be final in 120 days unless EPA receives adverse comments within 60 days).

[30] A search of the entire LEXIS Federal Register file in early March 1995, using the search terms "direct final rule or direct final rulemaking," turned up 449 documents. Adding the modifier "and not (EPA or USEPA)" reduced the list to 26 documents.

[31] *See Potential-to-Emit Policy Provided to States Under New EPA Policy*, Nat'l Envtl. Daily (BNA), Jan. 30, 1995 (plan to use direct final rule to approve states' potential-to-emit limitations for facilities that seek to avoid "major source" designation under Clean Air Act); *EPA To Craft New Policy on*

B. Department of Agriculture

Five agencies within the Department of Agriculture have announced within the past year and a half that they intend to make use of the direct final rulemaking technique.[32] Instead of incorporating the technique into their processes for handling specific programmatic challenges, as EPA did with its SIPs and SNURs, the Agriculture agencies have taken a more generic approach. They have simply released policy statements declaring that they will make use of direct final rulemaking in appropriate circumstances. All the notices state that the issuing agency will use direct final rulemaking only for rules that are considered to be noncontroversial and unlikely to generate adverse comments, and that the agency will look to past experience with similar rules in making these predictions.

Despite minor differences in wording of the notices, all of the Agriculture agencies intend to use the same procedures for direct final rulemaking. All use a sixty-day period before an unopposed rule becomes effective and a thirty-day period during which the public may submit an adverse comment or a notice of intent to submit one. Unlike EPA's statements, the Agriculture statements also contain a definition of "adverse" (all substantially the same as each other). A typical passage, that of the Animal and Plant Health Inspection Service (APHIS), reads:

> By "adverse comments" we mean comments that suggest that the rule should not be adopted, or that suggest that a change should be made to the rule. A comment expressing support for the rule as published would obviously not be considered adverse. Neither would a comment suggesting that requirements in the rule should, or should not, be employed by APHIS in other programs or situations outside the scope of the direct final rule.[33]

In addition, the Agriculture agencies' procedure differs from EPA's in that it contemplates a "confirmation notice" in the Federal Register advising the public after the thirty-day comment period that no adverse comments were received and the rule has gone into effect.[34] When EPA engages in direct final

---

Corporate Audits, Nat'l Envtl. Daily (BNA), Jan. 9, 1995 (plan to use direct final rule to establish policy for giving "traffic tickets" to minor offenders).

[32] *See* 60 Fed. Reg. 10,303 (1995) (Grain Inspection, Packers and Stockyards Administration); 59 Fed. Reg. 51,083 (1994) (Agricultural Marketing Service); 59 Fed. Reg. 34,375 (1994) (Food Safety and Inspection Service); 59 Fed. Reg. 42,487 (1994) (Federal Crop Insurance Corporation); 58 Fed. Reg. 47,206 (1994) (Animal and Plant Health Inspection Service).

[33] 58 Fed. Reg. at 47,206.

[34] *See, e.g., id.*

rulemaking, it publishes a second notice only if it decides *not* to let a rule go into effect.[35]

Some of the Agriculture agencies have already resorted to direct final rulemaking, producing an interesting harvest of regulations. For example, APHIS was the first of the Agriculture agencies to develop a policy for this technique. It has successfully used direct final rules to exclude six varieties of rust-resistant barberry plants from its black stem rust quarantine;[36] to designate the Cincinnati airport a limited port of entry for importation of pet birds;[37] to add various breeds of horses and cattle to its list of purebred animals;[38] and to add New Hampshire to the list of states authorized to receive mares and stallions imported from certain countries.[39] A direct final rule promulgated by the Food Safety and Inspection Service (FSIS) permits importation of meat products from the Czech Republic (rather than from "Czechoslovakia," as under the prior rule).[40] One is not surprised that the agencies expected to receive no comments on technical regulations such as these.

In one instructive episode involving direct final rulemaking, APHIS announced on March 1, 1994, that it would permit importers of mangoes and grapefruits from Mexico to use hot forced air in treating their wares for fruit flies. The agency received *exactly one* adverse comment — from a citrus industry representative, who noted that the specifications in the rule would exclude several larger sizes of grapefruit from the rule's scope. True to the paradigm of direct final rulemaking, APHIS withdrew the rule on April 21. On November 14, the agency republished a proposed rule extending the plan to the larger grapefruits, and, upon receiving only favorable responses, finalized the rule on February 6, 1995. Thus, a single negative comment caused the rulemaking to extend over eleven months rather than sixty days.[41]

C. Department of Transportation

Finally, direct final rulemaking has made an appearance in one, or perhaps two, agencies within the Department of Transportation. The Federal Aviation Administration (FAA) has issued a proposed regulation adopting procedures for direct final rulemaking.[42] Like the Agriculture agencies' policy statements, the regulation is intended as a generic model, usable in diverse contexts. The proposed procedure is basically the same as the Agriculture model, including a confirmation notice if no adverse comment is received. The FAA's definition of "adverse comment" is slightly different:

---

[35] *See, e.g.*, 54 Fed. Reg. 31,298, 31,299 (1989) ("routinely only one *Federal Register* document is required to establish a SNUR").

[36] 59 Fed. Reg. 17,917 (1994).

[37] 59 Fed. Reg. 44,893 (1994).

[38] 59 Fed. Reg. 49,785 (1994).

[39] 59 Fed. Reg. 63,698 (1994).

[40] 60 Fed. Reg. 18,540 (1995).

[41] 60 Fed. Reg. 6957 (1995). For a similar incident in which a SIP revision took a year to promulgate because EPA's receipt of a single adverse comment prevented the completion of direct final rulemaking, see 59 Fed. Reg. 5724 (1994) (SIP regulating emissions of volatile organic compounds in San Joaquin Valley, California, was intercepted by adverse comment from Flexible Packaging Association).

> Comments that are outside the scope of the rule will not be considered adverse under this procedure. A comment recommending a rule change in addition to the direct final rule would not be considered an adverse comment, unless the commenter states that the rule would be inappropriate as published or would be ineffective without the additional change.[43]

The FAA notice discusses some of the contexts in which the agency anticipates relying on direct final rulemaking. The agency expressly contemplates using the process in conjunction with regulatory negotiation: direct final rulemaking may be invoked for "noncontroversial rules *and consensual rules*, where [FAA] believes there will be no adverse public comment."[44] Specifically, the agency would consider issuing a direct final rule where a broad-based advisory group such as its Aviation Rulemaking Advisory Committee has negotiated a unanimous recommendation and the agency expects no adverse comments, such as a recommendation "to harmonize FAA and European technical standards for the manufacture of aircraft."[45] Airworthiness directives, amendments to airspace designations, and extensions of compliance dates are other types of rules that the agency foresees developing through direct final rulemaking, if it expects a particular rule to be noncontroversial.[46]

Another agency within the Department of Transportation, the Research and Special Programs Administration (RSPA), has issued rules that bear at least a resemblance to direct final rules, although the agency did not use that term to describe them. RSPA issued a pair of rules extending the dates on which it would require compliance with pre-existing regulations — one dealing with construction of cargo tanks,[47] the other with transportation of infectious substances.[48] Viewing each time extension as "noncontroversial," and "not anticipat[ing] any adverse comments," RSPA invoked the procedures associated with direct final rulemaking: If no adverse comments were received, the extension would stand (as did occur with the cargo tanks rule[49]); but if RSPA were to receive comments demonstrating that an extension was unjustified, the agency would withdraw it and republish it as the basis of an ordinary notice and comment proceeding.

---

[42] 59 Fed. Reg. 50,676 (1994), *to be codified at* 14 CFR §11.17.
[43] *Id.* at 50,677.
[44] *Id.* at 50,676 (emphasis added).
[45] *Id.* at 50,677.
[46] *Id.*
[47] *See* 59 Fed. Reg. 1784 (1994) (announcing cargo tanks regulation).
[48] *See* 59 Fed. Reg. 48,762 (1994) (announcing infectious substances regulation).

These two extension rules did not exactly fit the direct final rulemaking paradigm, because in each proceeding the agency made clear that only *persuasive* comments would deflect it from its intended course of action; the mere fact that they were adverse would not have sufficed (nor, presumably, would a mere declaration of intent to submit comments). Indeed, RSPA did receive a comment attacking the extension of the infectious substances rule, but went ahead with its original plan, concluding that the commenter's arguments were outweighed by other considerations.[50] The proceedings might be better understood as examples of interim final rulemaking, supported by (implicit) findings of "good cause" and accompanied by the assurance of a round of notice-and-comment if a proposal were to make a case for one.[51] Even granting that these proceedings were not true examples of direct final rulemaking, however, they at least demonstrate that awareness of direct final rulemaking is percolating through the executive branch and that there is a need to clarify the appropriate occasions for its use. That is the task to which this paper is devoted.

II. The Legality of Direct Final Rulemaking

There has never been a legal challenge to a direct final rule, according to officials at EPA (the only agency that has been issuing such rules long enough to have provoked such a challenge).[52] This should not be surprising, because rules that survive the objection period provided in direct final rulemaking tend, by definition, to be so noncontroversial that nobody desires to challenge them, in court or even before the agency.

---

[49] *See* 59 Fed. Reg. 12,861 (1994) (confirmation notice for cargo tanks rule).

[50] 59 Fed. Reg. 53,116 (1994) (confirmation notice for infectious substances rule).

[51] *See also* 59 Fed. Reg. 29,379 (1994), in which RSPA used similar procedures as a vehicle for inviting requests for reconsideration on one issue involved in a regulation governing pressure testing of pipelines. The underlying regulation had been developed through traditional notice and comment, but the specific issue of whether petroleum could be used for this purpose had not been explicitly raised before. Thus, the invitation to submit comments may have served to head off any controversy over whether the petroleum issue was a "logical outgrowth" of the original notice.

[52] IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43. Like any other rule, of course, a direct final rule could be challenged for exceeding the agency's authority, constituting an abuse of discretion, etc. This Part deals only with whether the use of direct final rulemaking could itself be a basis for challenge.

Nevertheless, the lack of challenges to the legitimacy of direct final rulemaking may not last for long.[53] For example, even if no one cares to object to the abbreviated procedure at the promulgation stage, a regulated person who is faced with an enforcement or penalty action for violating a direct final rule would have a strong incentive to challenge the rule if possible. This scenario might be especially likely if agencies follow the lead of the FAA and use direct final rulemaking to adopt negotiated rules[54] — which rest upon consensus of the immediate participants but are not necessarily inconsequential in their impact.

In any event, if one is interested in encouraging use of direct final rulemaking by agencies that have not already made a commitment to the practice, one must address an issue that would naturally occur to them: the magnitude of the litigation risks they might run by engaging in it. It seems appropriate, therefore, to examine the grounds on which direct final rulemaking might be challenged and the arguments that can be raised in its defense.

Broadly speaking, a legal defense of direct final rulemaking is likely to take one of two different paths. One approach, considered in Section A of this Part, would see direct final rulemaking as a systematic device for implementing the "good cause" exemption to the APA notice-and-comment requirements. The prospects for agencies' making effective use of this theory depend on whether the government can successfully navigate some relatively uncharted legal waters, but if it should prove viable it would offer the government the maximum in practical latitude. The second approach, considered in Section B, would argue that the direct final rulemaking process, or something very much like it, may substantially comply with the informal rulemaking procedures of the APA. There is a strong argument that the APA model permits at least some forms of direct final rulemaking, but this line of analysis may not permit quite as much streamlining as agencies would like. Finally, Section C of this Part examines an additional factor that is common to the two approaches: the agency's obligation to give adequate preparation time to the public before a direct final rule becomes effective.

A. Direct Final Rulemaking and the Good Cause Exemption

The first line of reasoning to be examined rests on the premise that the circumstances in which an agency pursues direct final rulemaking are, virtually by definition, exempted from the usual public participation requirements of the APA, because such participation would be "unnecessary" within the meaning of the good cause exemption of section 553(b)(B).[55] That provision states that the usual notice-and-comment obligations of sections 553(b) and (c) do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, *unnecessary*, or contrary to the public interest."[56] Although the tradition has been to construe the good cause exemption narrowly,[57] the arguments for invoking the exemption in the present context turn out to be surprisingly strong.

---

[53] *See AOPA Says Direct Rulemaking May Contain Flaw*, Aviation Daily (McGraw-Hill), Jan. 13, 1995, at 70 [hereinafter *AOPA Objection*] (assertion by general counsel of Aircraft Owners and Pilots Association that FAA's proposed direct final rulemaking procedures "'may well contravene the intent, if not the letter, of the Administrative Procedures [sic] Act'").

[54] *See supra* note 44 (noting FAA's interest in such use).

Although the agencies that engage in direct final rulemaking have never expressly invoked the good cause exemption in this connection, they may well have proceeded on the assumption that it applies. Agencies never refer to a direct final rule as a "proposed" rule. As its name implies, the rule is regarded as *final* from the moment of its first publication.[58] Direct final rules are always published in the final rules section of the Federal Register, not the proposed rules section.[59] Regardless of the agencies' intentions, however, the good cause theory appears to be the most credible way to fit actual practice into the structure of the APA.

The standard explanation of the meaning of the "unnecessary" component of the good cause exemption stems from the legislative history of the APA. According to the House and Senate reports accompanying the enactment of the APA, the term means "unnecessary so far as the public is concerned, as would be the case if a minor or technical amendment in which the public is not particularly interested were involved."[60] This exegesis directly parallels the explanation that agencies routinely give when they invoke the direct final rulemaking process: that they have done so because they believe the rule in question to be noncontroversial and unlikely to attract public comment.

One can, accordingly, think of the direct final rulemaking process as an imaginative mechanism for implementing the "unnecessary" component of the good cause exemption in a responsible fashion. It is analogous to the procedure that the Administrative Conference has recommended that agencies follow when they invoke the *other* components of the good cause exemption (those in which the agency finds prior public comment to be "impracticable" or "contrary to the public interest"). In those situations, ACUS has said, the agency should solicit post-promulgation comment instead.[61] Direct final rulemaking is at least as protective of the public as that procedure. It embodies a built-in safeguard against the possibility that the agency may have erred in believing that the public would not wish to comment: if even one person submits an adverse comment, or demonstrates an intent to do so, the rule is withdrawn.

---

[55] There is also a "good cause" exemption permitting an agency to make a rule effective less than thirty days after publication. *See* 5 USC § 553(d)(3) (1988). That exemption falls outside the present discussion but will be considered below. *See infra* Part II.C.

[56] 5 USC § 553(b)(B) (1988) (emphasis added).

[57] *See generally* Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 333-43 (1989); Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113 (1984).

[58] EPA's original name for the technique, "immediate final rulemaking," *see supra* note 13, is even more revealing in this regard.

[59] *See, e.g.*, 40 CFR § 721.170(d)(4)(i)(A) (1994).

[60] *See* SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 200 (Senate), 248 (House) (1946) [hereinafter APA LEGISLATIVE HISTORY].

Although the matter is not free from doubt, the case law construing the "unnecessary" exemption supports the validity of direct final rulemaking. Judicial decisions construing the exemption appear to accept at face value the committee reports' explanation of the term "unnecessary;"[62] thus, when presented with the kind of cases that are characteristic of direct final rulemaking — cases that do tend to involve "minor and technical" matters in which the public "is not particularly interested" — one may assume that they would be receptive to a claim of exemption. A fortiori, they should be receptive to direct final rulemaking, in which the agency, which could have provided no public procedure at all, instead allows any member of the public to trigger notice-and-comment proceedings by filing an adverse comment.

It is true that government efforts to invoke the exemption seem to lose more often than they win, but part of the reason is that, in several of the relatively few cases involving the exemption that have actually been litigated, agencies have sometimes resorted to strained arguments that have very little to do with the actual rationale of the exemption, as stated in the legislative history. For example, the case law tends to repudiate the ideas that prior public participation in a rulemaking is "unnecessary" if the agency could have developed its policy through adjudication instead, or if the agency invited post-promulgation comment instead, or if the rescission of a rule restores a status quo ante about which the public had a chance to comment when the rule was first promulgated.[63] The courts' rejection of these shaky propositions was perfectly understandable.

---

[61] *See* ACUS Recommendation 83-2, 1 CFR § 305.83-2 (1993). This advice was expressly made inapplicable to rules in which the agency determines public comment to be "unnecessary." *Id.* ¶ 1.

[62] *See* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1484 n.2 (9th Cir.), *cert. denied*, 113 S. Ct. 598 (1992); National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377 (2d Cir. 1978); National Helium Corp. v. FEA, 569 F.2d 1137 (Temp. Emer. Ct. App. 1977); Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969).

[63] Cases rejecting these arguments are recounted, and discussed with approval, in Jordan, *supra* note 57, at 130-35. Professor Jordan also cogently criticizes decisions *upholding* the argument that public comment may be "unnecessary" if the matters addressed in the rule were previously ventilated in proceedings before state agencies. *Id.* at 132-33.

Perhaps the larger difficulty emerging from the case law is the tradition that exceptions from notice and comment procedure should be "narrowly construed and reluctantly countenanced."[64] This restrictive attitude towards the good cause exception reflects a judicial belief in the inherent advantages of public proceedings; it may also stem from a fear that agencies will apply the exemption with a systemic bias towards their desire to fulfill their own statutory mission, with too little heed for the perspectives of members of the public who might not share the agency's belief in the rightness of its cause.

Whatever force these rationales may possess in other contexts, they seem out of place in the present context. As just noted, the critical feature of direct final rulemaking is that even one objector can "blackball" the rule — as the episode involving the APHIS rule on mangos and grapefruits aptly illustrates.[65] The agency's commitment to withdraw the rule if it receives an adverse comment (or even a notice of intent to submit an adverse comment) is a safety valve protecting the interest of members of the public to present their views to the agency if they so desire. More than that, it gives the agency an incentive to use direct final rulemaking only for matters that it genuinely expects to be noncontroversial. For, if the "blackball" forces a withdrawal of the direct final rule, the agency must begin all over again with notice and comment, and will probably complete the proceeding later than if it had not resorted to direct final rulemaking in the first place. Thus, as other observers have noted, the dynamics of the direct final rulemaking system exert a self-policing influence on the agency.[66]

Accordingly, although in the abstract one might be disinclined to trust an agency's potentially self-serving declaration that it does not believe the public would disagree with its position, the combination of that perception *and* the subsequent failure of the public to register an objection, after an opportunity to offer one, creates a highly credible case for the applicability of the "unnecessary" criterion.

To be sure, some cases have held that an invocation of the good cause exemption cannot succeed unless the agency *expressly* invokes the exemption and presents reasons to bolster its position.[67] Indeed, the statutory language supports this line of reasoning as a general proposition. Nevertheless, these cases (none of which has involved the "unnecessary" branch of good cause) seem basically concerned with preventing agencies from devising post hoc rationalizations to justify their failure to observe their statutory obligations. Agencies engaging in direct final rulemaking do regularly articulate an express conclusion that they believe the rule to be noncontroversial and unlikely to attract comment. This is exactly the sort of inquiry contemplated by the exemption; no purpose would be served, no extra thought stimulated, by a judicial insistence that the agency recite the magic words "good cause."

---

[64] Action on Smoking and Health v. CAB, 713 F.2d 795, 800 (D.C. Cir. 1983); *see, e.g.*, National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377 (2d Cir. 1978); American Iron & Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977).

[65] *See supra* note 41 and accompanying text.

[66] *See* IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43; Donnelly, *supra* note 6 (quoting an FSIS official: "It would not be in the interest of the agency to issue a direct final rule and then receive adverse comments and have to start the whole process anew ...."). EPA's recent policy of issuing certain direct final rules at the same time as a parallel notice of proposed rulemaking, *see supra* 23 note and accompanying text, reduces this self-policing influence. Even when an agency follows this approach, however, its commitment to withdraw the rule if anyone expresses opposition helps to protect the public from overly aggressive reliance on direct final rulemaking.

In any event, although the judicial literature, read in isolation, might convey the impression that the "unnecessary" exemption can come into play only in rare and exceptional circumstances, agencies make use of the exemption in numerous cases that do not show up in court. Professor Lavilla, after examining every issue of the Federal Register during a six-month period, found that agencies had invoked the good cause exemption in twenty-five percent of the rules they published.[68] Of the rules accompanied by findings of good cause, twenty percent relied on the "unnecessary" criterion alone.[69] Thus, agencies deemed public comment "unnecessary" in roughly five percent of all the rules they announced during this period. Lavilla identified a number of rules that had involved such minimal changes in the legal order that the agencies seemed correct in finding public comment superfluous.[70] Such rules constitute a wide body of agency actions that would appear to lend themselves, at least potentially, to the use of direct final rulemaking.

One might ask, however, why an agency should use direct final rulemaking in a case in which it could use the good cause exemption to avoid any public procedures at all. One answer is that a process that smokes out unanticipated adverse reactions gives the agency precisely the benefits that notice and comment procedure is supposed to provide: the opportunity to avoid mistakes, to learn from others' perspectives, and to enhance the public acceptability of the ultimate product. A more hard-headed answer is that rules issued under the good cause exemption are always vulnerable to a risk that a court may subsequently find that the agency invoked the exemption erroneously. Direct final rulemaking is a means by which the agency can, at low cost, reduce that risk.[71]

---

[67] *See, e.g.*, Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1145-46 (D.C. Cir. 1992); Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972). *But see* DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1333 (Temp. Emer. Ct. App. 1974) (excusing omission of reasons); Wells v. Schweiker, 536 F. Supp. 1314, 1323 (E.D. La. 1982).

[68] Lavilla, *supra* note 57, at 338-39 & n.86. Including rules in which agencies appeared to have *tacitly* invoked the exemption would have raised this figure to thirty-three percent. *Id.*

[69] *Id.* at 351 n.124. This figure would more than double if one were to include those instances in which the agency invoked the "unnecessary" test in conjunction with one or both of the other tests in the good cause exemption. *Id.*

[70] *Id.* at 389-90 (citing, e.g., rules rescinding provisions that were obsolete or that the agency no longer had authority to enforce).

B. Direct Final Rulemaking as Notice-and-Comment Rulemaking

Although the argument for sustaining direct final rulemaking under the good cause exemption seems cogent, its ultimate prospects are uncertain, because of the caution that courts have traditionally displayed in overseeing the agencies' administration of the exemption. Moreover, even if the courts ultimately find that *most* direct final rulemaking fits within the exemption, they might decide that some particular rules do not. Accordingly, the following discussion explores an alternative theory: that direct final rulemaking, or at least some versions of it, is consistent with the informal rulemaking procedures of the APA. Of course, as we have seen, the agencies do not purport to follow section 553 procedure; they do not, for example, "propose" a rule for comment when they issue a direct *final* rule.[72] Nevertheless, there is room to contend that what agencies actually do in some forms of direct final rulemaking constitutes substantial compliance with the APA.

1. Notice and opportunity for comment

It seems fairly clear that direct final rulemaking substantially complies with an agency's obligation to provide notice of the proposed rule (subsection (b)) and an opportunity to comment on it (subsection (c)). The agency can easily include in its Federal Register notice all the information that subsection (b) requires. Similarly, all direct final rulemaking schemes entail an invitation to members of the public to submit comments. The time period typically allowed for those comments, thirty days, is not lengthy, but it appears to fall within the normal range for relatively simple rulemaking proceedings.[73] Of course, any agency

---

[71] To be sure, there are cases in which an agency *should* use the good cause exemption to forgo all public procedures, including direct final rulemaking. *See id.* at 386-88 (citing situations in which agency had absolutely no discretion about the contents of its rule, such as where its task was merely to make a mathematical calculation, ascertain an objective fact, etc.).

[72] *See supra* notes 58-59 and accompanying text.

[73] ACUS has recommended that Congress amend § 553(b) to specify a comment period of "no fewer than 30 days." ACUS Recommendation 93-4, ¶ IV.B., 59 Fed. Reg. at 4674. Although the Conference regarded this thirty day period as a minimum (subject to the agency's ability to provide a shorter period, or none, by showing "good cause"), it would be hard to fault an agency for allowing only the accepted minimum period in a rulemaking proceeding that is expected to be noncontroversial.

Case law discussing how much time must be allowed in a comment period is almost nonexistent. In one case, the court criticized (in dictum) a ten-day period but provided no general guidance except for one platitude: § 553(b) "means that a reasonable notice shall be given, though of necessity the period must be could institute a longer comment period without frustrating the essential nature of the direct final rulemaking approach.

One might question whether the fact that the issuing agency characterizes the rule as "final" could reasonably be understood as implying that agency staff are already wedded to their position.[74] Such an implication would be problematic under section 553(b), because the public might then be less willing to comment (believing it to be futile) and the staff might not give full consideration to any comments that did arrive. Concerns of this kind underlie the courts' usual reluctance to permit post-promulgation comment to substitute for pre-promulgation comment, for example in cases involving interim final rules.[75]

However, any such argument appears to be misdirected. As we have seen, the realities of direct final rulemaking militate sharply against the agency's developing a mindset that would lead it to assume that the rule is a fait accompli, because even one objector can "blackball" the rule.[76] Knowing this, agency personnel have a strong incentive not to think of the publication of a direct final rule as settled policy. Of course, there is ultimately no way to prevent administrators from harboring a degree of psychological commitment to the positions they espouse in proposed rules; indeed, a degree of policy orientation is inevitable and necessary.[77] But the controlling point is that the dynamics of the direct final rulemaking approach seem unlikely to aggravate whatever tendencies toward psychological commitment inhere in the ordinary rulemaking process. The word "final" that is used in the published notice is in the end only a word; any connotation of irrevocability is belied by the underlying dynamics of the context in which it appears.

---

subject to some flexibility." Fund for Animals v. Frizzell, 530 F.2d 982, 988, 990 (D.C. Cir. 1976). A dictum in another case relied on the ACUS guideline to suggest that thirty days would have been a "barebones" comment period. Petry v. Block, 737 F.2d 1193, 1201-02 (D.C. Cir. 1984).

[74] One industry spokesman has asserted: "There are frequent circumstances where our members have felt they did not have adequate opportunity for input to the FAA early enough before views and positions started to harden, ... and direct final rulemaking raises concerns about an even more abbreviated procedure." *AOPA Objection*, *supra* note 53, at 70.

[75] *See, e.g.*, United States Steel Corp. v. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979); Asimow, *supra* note 7.

[76] *See supra* note 65 and accompanying text.

[77] *See* Association of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979) (holding that policymakers may be disqualified for prejudgment in rulemaking proceedings only under extremely limited circumstances), *cert. denied*, 447 U.S. 921 (1980); *id.* at 1176 (Leventhal, J., concurring) ("It would be the height of absurdity, even a kind of abuse of administrative discretion, for an agency to embroil interested parties in a rulemaking proceeding, without some initial concern that there was an abuse that needed remedying ....").

2. Publication of Rule and Statement of Basis and Purpose

To prevail under the "substantial compliance" theory, an agency defending a direct final rule would also need to demonstrate that it has complied in substance with two publication requirements. Section 552(a)(1) of the APA requires each agency to "separately state and currently publish in the Federal Register ... (D) substantive rules of general applicability ...." Also, section 553(c) requires an agency to "incorporate in the rules adopted a concise statement of their basis and purpose." Normally, these obligations are met at the end of the rulemaking process, by the publication of a final rule in the Federal Register, together with an explanatory statement. In direct final rulemaking, however, the EPA publishes nothing at all at the end of the process (i.e., when it determines that no one has submitted or intends to submit an adverse comment). The Agriculture agencies do publish a confirmation notice to announce that the rule will stand, but such notices are only a few inches long.[78] These agencies do not republish the text of the direct final rule, nor do they state the "basis and purpose" of the rule at that time. On the surface, at least, both omissions seem to violate the APA.

This potential objection seems unduly formalistic, however. The text of the rule itself will generally be unchanged since its publication in the original announcement. Thus, that publication would seem adequate to satisfy the agency's obligation under section 552(a)(1). If the agency does decide to make changes in the rule, those changes undoubtedly would be stated in a Federal Register notice when the rule is finalized.[79]

As for the statement of basis and purpose, the same sentence of the APA that imposes this obligation indicates that the statement should be published "[a]fter consideration of the relevant matter presented."[80] If the agency has received *no* "relevant matter," or at least none arguing against adoption of the rule, it seems logical to presume that the agency's reasons for adopting the rule are the same as they were when it proposed the measure some thirty days earlier. Notices initiating a direct final rulemaking proceeding always contain a statement of reasons, which in every substantial sense can serve the same functions as a traditional statement of basis and purpose. This conclusion is supported by cases holding that, for purposes of a court's exercise of its substantive review functions, an agency's failure to publish an explanatory statement is not fatal if the action is self-explanatory.[81] In short, direct final rulemaking appears to be in substantial compliance with the publication requirements of the APA, because members of the public receive the same information about the contents and rationale of the rule that they would receive in a typical rulemaking proceeding — only sooner.

---

[78] *See, e.g.*, the APHIS confirmation notices cited in notes 36-39 *supra*.

[79] *See* 59 Fed. Reg. 17917 (1994) (confirming adoption by APHIS of black stem rust quarantine rule and correcting the name of one species affected).

[80] 5 USC § 553(c) (1988).

[81] *See, e.g.*, American Standard, Inc. v. United States, 602 F.2d 1235, 1249-50 (Ct. Cl. 1979); Alabama Ass'n of Ins. Agents v. Board of Govs., 533 F.2d 224, 236-37 (5th Cir. 1976).

C. The Issue of Preparation Time

Regardless of whether agencies rely on a "good cause" theory or a "substantial compliance" theory to validate direct final rulemaking, they must confront the implications of the section 553(d) requirement that, in general, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date."[82] Indeed, there are grounds for concern that *none* of the agencies that now utilize direct final rulemaking is in complete compliance with this APA provision. Once they face the issue, however, agencies should have little difficulty adapting to meet the provision's requirements.

The purpose of section 553(d) is stated in the House and Senate committee reports accompanying the APA: to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt."[83] On a general level, the interest of regulated persons in receiving adequate advance notice of a change in the law before it becomes enforceable seems evident; it even has an arguable constitutional dimension.[84] A small business, for example, might not be able to comply with a new regulation until it has revised its printed forms to reflect new regulatory requirements, or has held a training session to acquaint employees with those requirements. Congress has concluded that, with certain exceptions to be discussed presently, regulated persons are entitled to at least a month's lead time in order to make such preparations for compliance.

The specific problem that section 553(d) poses in the context of direct final rules is that, although interested persons know from the outset of the rulemaking proceeding what the text of the rule is expected to be, they cannot know until after the comment period whether the agency will let the rule become *effective*. It can be strongly argued that regulated persons, such as the hypothetical small business just mentioned, cannot fairly be expected to begin gearing up for compliance until they know whether the agency means to stand by the direct final rule. (Note, in this connection, that the absence of controversy over whether the rule should be adopted would by no means negate the possibility that the steps required to come into compliance would be burdensome.) Under the normal APA rulemaking scheme, the thirty-day period of section 553(d) does not begin to run from the publication of a *proposed* rule; the clock begins running only after the agency publishes the *final* rule, even if the agency does not change the text of the rule.[85] One need make only a small extension of this principle in order to draw the conclusion that a direct final rule should not go into effect until at least thirty days after the public has notice that the agency has decided not to withdraw the rule.

---

[82] 5 USC § 553(d) (1988).

[83] APA LEGISLATIVE HISTORY, *supra* note 60, at 201 (Senate), 259 (House).

[84] *See* Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982) (to comply with due process in publicizing a statute, "[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply."). This fleeting reference to a "reasonable opportunity" has never been developed, and, in the absence of visible constitutional restraint, courts have sometimes stretched the presumption that everyone knows the law to remarkable lengths. *See* United States v. Casson, 434 F.2d 415 (D.C. Cir. 1970) (concluding that a burglar in the District of Columbia was on constructive notice by 10:00 p.m. that a bill increasing the District's penalties for burglary had been signed in Texas at 3:05 p.m.). The due process issue will not be pursued here, because the APA-conferred right to notice of the adoption of new regulations is surely as strong, and probably stronger, than any comparable constitutional right.

If the conclusion just stated is correct, the agencies that now use direct final rulemaking will surely need to modify their practices. This is most obviously true of EPA, which makes its direct final rules effective sixty days after issuance but does not make a formal announcement when a direct final rule survives the comment period. The world is left to speculate about whether the rule has gone into effect, at least until such time as it can reasonably assume the agency would have made an announcement if it were going to withdraw the rule.

The Agriculture agencies would also need to alter their practices. In their system, a direct final rule becomes effective on Day 60 after initial publication if no one files an adverse comment by Day 30, and the agency's policy is to publish a "confirmation notice" after the comment period to inform the public that the rule will indeed go into effect. Superficially, this system conforms to section 553(d), because the period from Day 31 to Day 60 meets the statutory standard. Yet that reasoning holds water only if, within twenty-four hours of the expiration of the comment period, three events occur: (a) the agency determines that it received no comments, or that any it may have received were not "adverse;" (b) the agency prepares the confirmation notice and forwards it to the Federal Register; and (b) the Federal Register publishes the notice. Common sense must recognize that things do not happen quite that rapidly in the federal government. Indeed, the first few confirmation notices from APHIS have been published an average of twelve days before their stated effective date.[86]

The analysis to this point has assumed that the APA rulemaking process is fully applicable to direct final rulemaking — a proposition most closely associated with what the preceding section called the "substantial compliance" theory. If, however, an agency can rely on the "good cause" exception of section 553(b)(B) as a justification for direct final rulemaking, the legal issue posed by section 553(d) is at least closer. The agency could take the position that its direct final rules are "final" immediately upon publication; on this premise, the sixty-day period customarily allowed between publication of the rule and its effective date more than meets the requirement of section 553(d).

---

[85] Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980).

[86] *See* 59 Fed. Reg. 63,698 (1994) (confirmation notice for horse importation rule, published seven days before effective date of rule); 59 Fed. Reg. 49,785 (purebred horses rule; seventeen days); 59 Fed. Reg. 44,893 (1994) (pet bird importation rule; thirteen days); 59 Fed. Reg. 17,917 (1994) (black stem rust rule; eleven days).

Yet one may wonder whether this argument would necessarily stand up in the event of judicial review. A court might well decide that, whatever label the agency chooses to affix, a direct final rule is actually somewhat tentative — in substance a *proposal* — until the comment period ends and the agency concludes that it has received no adverse comments (or written statements of intent to submit one). Requiring regulated parties to shoulder the burden of uncertainty as to whether the "final" rule will survive the comment period might seem incompatible with the underlying purpose of section 553(d).[87] In any event, the agency's defense assumes that the good cause exemption of section 553(b)(B) applies to direct final rulemaking, and that assumption, although strongly defensible, is not an entirely safe one.

Incidentally, section 553(d) does contain a "good cause" exemption of its own,[88] but any supposition that it can obviate all difficulties relating to the consistency of direct final rulemaking with section 553(d) would be ill-founded. It is fairly clear that an agency does not have good cause to make a rule immediately effective merely because it has good cause to dispense with notice and comment.[89] More specifically, a lack of controversy over the merits of a rule does not logically imply that persons governed by it should not be entitled to the thirty days of preparation time that section 553(d) sets as a presumptive norm. Of course, the good cause exemption is and should be available where there is some public urgency impelling the agency to make a given rule effective without delay; but where a rule is mundane enough to be a good candidate for direct final rulemaking, one would expect that the government will usually *not* be able to cite any strong need to expedite its proceedings. In fact, it appears that the government seldom if ever argues that there is "good cause" to make a regulation effective in less than thirty days because a month's wait is "unnecessary."

---

[87] The government's best argument here might be that section 553(d) does *not* guarantee a thirty-day period in which regulated parties are *certain* that a rule will go into effect. Even after issuing a "final" rule, an agency might later receive and act favorably on a petition for reconsideration; or the filing of a petition for judicial review might lead the agency or a court to stay the rule's effective date pending appeal. *See* 5 USC § 705 (1988) (authorizing stays). Similarly, the argument would continue, the possibility that the agency might withdraw a direct final rule because it has received unexpected adverse comments is simply another "condition subsequent" that does not negate the immediate finality of the rule for purposes of section 553(d). This argument may not carry the day, however. It is one thing to say that the preparation time afforded by section 553(d) is subject to contingencies such as reconsideration and judicial review, of which Congress must have been aware when it enacted the APA, and another to say that the time period must remain subject to the uncertainties stemming from an administrative agency's unilateral prediction that no one will oppose the rule.

[88] 5 USC § 553(d)(3) (1988). For surveys of the extensive and heavily fact-dependent case law, see Jordan, *supra* note 57, at 141-52; Kevin D. Hart, Annotation, *What Constitutes "Good Cause" Under Provision of Administrative Procedure Act (5 USCS § 553(d)(3)) Allowing Agency Rule to Become Effective Less than 30 Days After Publication*, 55 A.L.R. FED. 880 (1981).

[89] *See* UNITED STATES DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 37-38 (1947); Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir.), *cert. denied*, 113 S. Ct. 598 (1992); Wells v. Schweiker, 536 F. Supp. 1314, 1327-28 (E.D. La. 1982).

Section 553(d) does, however, contain at least one exemption that should prove useful to agencies in some direct final rulemaking contexts: a rule may be issued without the thirty-day delay in effective date if it "grants or recognizes an exemption or relieves a restriction." Many direct final rules fit within this category and thus can be put into effect as soon as the agency decides not to withdraw the rule.[90]

Given the concerns stated above, how could an agency shape its direct final rulemaking policies to avoid the risk of infringing section 553(d)? For an agency that issues confirmation notices, the answer seems clear. It could draft those notices to specify that a direct final rule will become effective no fewer than thirty days after the notice is published. Thus, if the confirmation notice happened to be published on Day 45, it could state that the rule will be effective on Day 75. If an agency has decided for some reason that it prefers not to issue confirmation notices,[91] it might experiment with a regulation declaring that a certain period of agency silence should be interpreted as meaning that the agency intends for the rule to become effective. The regulation might say, for example, that if the agency does not publish a notice withdrawing a direct final rule by Day 50 after its initial release, the public should assume that the rule will stand, with an effective date no earlier than Day 80.

Adoption of one of these approaches would seem sufficient to shield agencies from claims that direct final rulemaking violates section 553(d). Any of the approaches would of course make the process less speedy — but only by two or three weeks, which is not much compared with other common delays in the regulatory process.[92] At the same time, it would not detract from the capacity of direct final rulemaking to minimize unnecessary reviews and conserve agency staff time, which is probably the main attraction of the technique. An agency that is averse to legal risks may well find this tradeoff appealing.

---

[90] 5 USC § 553(d)(1) (1988). A third exemption, for interpretative rules and statements of policy, is probably irrelevant here. *See id.* § 553(d)(1). An agency is unlikely to use direct final rulemaking to promulgate such rules, because the APA allows them to be issued without notice and comment anyway. *Id.* § 553(b)(A).

[91] Policy considerations that might lead an agency to wish to avoid confirmation notices are explored below. *See infra* Part III.E.

[92] Such a brief delay would, for example, appear to preserve most of the time savings that EPA has realized by resorting to direct final rulemaking for revisions of SIPs. *See supra* note 16.

To be sure, the magnitude of the legal risks involved here should not be overstated. The weight of judicial authority indicates that a violation of section 553(d) should not serve to impair the validity of a regulation, but should only serve to extend the time period before it becomes effective.[93] That position seems sound as a general matter, because such a violation casts no doubt on the intrinsic soundness of the rule, and the extension accords the individual precisely the protection that section 553(d) contemplates. Thus, even if it were held that agencies have been infringing section 553(d) in all of their direct final rulemaking activities, that conclusion should not cast doubt on the enforceability of existing direct final rules, nor would it even subject the agency to much legal jeopardy in an individual case. Nevertheless, an agency policy that entails continuing violations of the APA should surely be changed.[94] The above discussion provides at least a context for reflection as to whether current modes of direct final rulemaking do entail such continuing violations.

III. Using Direct Final Rulemaking

Assume now that the legality of direct final rulemaking can be sustained on one or more of the theories reviewed in the preceding Part. Agencies that decide to make use of the device will have to examine a variety of issues regarding the proper occasions for and conditions of its use. This Part offers a checklist of several such issues.

---

[93] *See, e.g.*, Prows v. Department of Justice, 938 F.2d 274, 276 (D.C. Cir. 1991); Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir. 1980) (collecting cases); United States v. Gavrilovic, 551 F.2d 1099, 1106 (8th Cir. 1977) (by implication); Lewis-Mota v. Secretary of Labor, 469 F.2d 476 (2d Cir. 1972) (by implication). Cases that appear to hold otherwise are distinguishable in that they also involved an agency's failure to invite prior comment. *E.g.*, Sannon v. United States, 460 F. Supp. 458, 468 (S.D. Fla. 1978), *remanded on other grounds*, 631 F.2d 1247 (5th Cir. 1980); Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972). Understandably, courts are often reluctant to hold the latter type of error harmless, because of the difficulty of knowing what the comments would have said or how the agency would have reacted. *But see, e.g.*, Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (9th Cir.) (finding a failure to solicit prior comment harmless), *cert. denied*, 113 S. Ct. 598 (1992); Cal-Almond, Inc. v. Department of Agric., 14 F.3d 429, 442 (9th Cir. 1993) (following *Riverbend Farms*).

[94] A rule with a faulty effective date can create a trap for an unwary government litigant. If the pleadings in an enforcement action merely allege that the respondent violated the rule after the effective date stated in the rule, the litigation may be delayed by the respondent's contention that they fail to specify whether the offense occurred during a time period with respect to which the rule is enforceable. *See Rowell*, 631 F.2d at 704.

A. The Decision to Use Direct Final Rulemaking

The reasons why agencies should give serious consideration to using direct final rulemaking when possible are straightforward and have already been mentioned. The approach permits the agency to streamline its regulatory process by eliminating a second round of reviews for regulations that are noncontroversial enough to require only one, and thereby expediting the issuance of rules. As an efficiency measure, the technique generally meets with praise.[95] Looking for ways to shorten and simplify the rulemaking process seems especially important at a time when resource constraints are likely to become more stringent for a number of agencies. Not only are budgets likely to face downward pressure, but Congress now seems poised to enact comprehensive legislation that would *augment* the procedures agencies must follow when they promulgate so-called "major" rules.[96] Both of these developments will presumably drain resources away from agencies' efforts to generate rules that are not "major."

On the other hand, when a rule appears to be noncontroversial, direct final rulemaking can be a superior alternative to an agency's simply invoking the good cause exception and doing without any public proceedings at all. As has already been pointed out,[97] this technique not only gives the agency the benefit of any public input that may unexpectedly surface, but also may help shield the agency against a claim that the good cause exemption was improperly invoked (especially if the agency conducts the direct final rulemaking proceeding in a manner that can be credibly defended as substantial compliance with section 553 procedure).

Of course, an agency has to proceed carefully in selecting rules as candidates for direct final rulemaking. The most basic guideline is straightforward: an agency should resort to this device only in developing rules that are truly likely to be noncontroversial. This guideline follows directly from the self-policing feature of the process that has been mentioned earlier:[98] If the agency proves mistaken in its prediction that no one will seek to comment adversely, and the rule has to be withdrawn and resubmitted for notice and comment, the ultimate issuance of the rule will take longer than if the agency had never tried to use direct final rulemaking.[99]

---

[95] *See supra* notes 3-6 and accompanying text.

[96] *See, e.g.*, S. 343, 104th Cong., 1st Sess. (1995). The oversight program administered by the Office of Information and Regulatory Affairs already requires executive agencies to follow special procedures when they develop major rules, *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), but the pending legislation would extend this obligation to independent agencies, broaden the definition of "major rule," and specify new areas of inquiry.

[97] *See supra* note 71 and accompanying text.

[98] *See supra* notes 65-66 and accompanying text.

[99] No such delay will occur if the agency follows EPA's recent practice of issuing "companion" notices of proposed rulemaking to accompany certain direct final rules. *See supra* note 23 and

Aside from the built-in incentive to exercise self-restraint in the use of direct final rulemaking, agencies might at least consider the risk that the use of this technique could foster misunderstanding in some contexts. The announcement of a so-called "final" rule might inadvertently convey the impression that the agency would be reluctant to consider adverse public comments about its intended course of action.[100] Of course, the fact that anyone could "blackball" the rule ought to negate any such impression, but a risk of confusion may exist nevertheless.[101] Probably, however, the main conclusion to be drawn from the existence of this risk is that the agency must take pains to explain what it is doing, not that it should forgo direct final rulemaking entirely.

B. Regularization of Direct Final Rulemaking Procedures

Much can be said for the actions of the FAA and the various Agriculture Department agencies to promulgate a general policy statement defining the procedures they will use in direct final rulemaking proceedings. Although the essential features of the device are simple enough that they can be (indeed, should be) explained each time the agency uses it, a generic framework should promote consistency in the agency's processes and should spare it the necessity to reinvent the wheel every time it wishes to invoke the device in a new setting. As the use of direct final rulemaking spreads, agencies that are new to the practice would benefit from being able to borrow from standardized models (which may not all be identical, of course) developed by agencies that have longer experience with it.

C. The Length and Purpose of the Comment Period

In most direct final rulemaking proceedings, agencies have allowed thirty days for members of the public to submit adverse comments or written notice of an intent to submit adverse comments.[102] This figure falls within the normal

---

accompanying text. Such a policy does not, however, change the reality that the agency will have to withdraw the direct final rule if it receives an adverse comment. Thus, the agency still has good reasons not to resort to direct final rulemaking indiscriminately, because if a member of the public objects to the rule, the agency will have wasted time and resources publishing two Federal Register notices (one announcing the direct final rule and one withdrawing it) to no avail.

[100] *See supra* note 74.

[101] A misunderstanding of this kind is probably least likely to occur in regulatory settings in which the agency uses direct final rules routinely. By now, for example, environmental lawyers have had ample opportunity to become accustomed to the procedures that EPA uses when it institutes new SIPs and SNURs.

[102] Thirty days is the period usually allowed by EPA and the Agriculture agencies. *But see supra* note 29 (allowance of 60 days for objections to EPA storm water discharge rule). The FAA procedural regulation does not specify a length for the comment period, apparently leaving this decision for case-by-case determination.

range for rulemaking proceedings.[103] The Administrative Conference has, however, encouraged agencies to allow longer comment periods in notice-and-comment rulemaking,[104] and agencies issuing direct final rules have a similar choice to make.

The issue here is largely the same as would arise in ordinary notice-and-comment proceedings: the agency must balance the desire for streamlining with the need to make sure that interested persons are able to learn about the rulemaking, consult internally, and register a response. A few difference between the two types of proceedings may be noted. On the one hand, members of the public arguably needs less time to respond to a direct final rule than to a typical proposed rule, because they only need to notify the agency of an *intention* to submit adverse comments; they do not actually need to write them. On the other hand, if resort to the direct final rulemaking process does trigger concerns about the rule being "railroaded," the agency might decide to extend its comment period in order to assuage concerns in the regulated or beneficiary community about its own openmindedness.[105]

A different sort of question about the comment period concerns its underlying purpose: should it serve merely as a mechanism for determining whether or not the rule is controversial, or should it also serve as the primary (or even exclusive) opportunity for interested persons to express their views on the merits? In essence, this question requires an appraisal of EPA's recent practice of sometimes issuing a direct final rule together with a "companion" notice of proposed rulemaking.[106] Under this practice — originally devised as a policy for processing SIP revisions, but later used in some other contexts as well — the public's only opportunity to comment occurs at a time when no one is sure whether the agency's effort to proceed by direct final rule will be successful. In initiating this procedure, EPA explained that it "eliminates the need for a new proposed rule and an additional comment period, and assists in getting these SIP actions published in a more expedient manner."[107]

Although streamlining is the fundamental idea behind direct final rulemaking, there are grounds for concern that EPA's new twist on the technique may carry this goal too far. Arguably, the approach makes the public's opportunity to comment less meaningful than it should be. When an agency publishes a notice of proposed rulemaking as a companion document to a direct final rule, making an express finding that it expects the rule to be noncontroversial, it may instill a false sense of security in interested persons whose views ought to be heard in the event that the direct final rule is withdrawn. For example, an environmentalist organization might refrain from commenting on a direct final rule because it expects EPA's position to stand and considers the rule livable; but if the agency discovers that it must proceed with a full-fledged rulemaking proceeding because of an adverse comment from industry, the environmentalists perhaps deserve to be given a fresh opportunity to challenge industry's claims or to argue for changes in the opposite direction.[108]

---

[103] *See* ACUS Recommendation 93-4, ¶ IV.B, 59 Fed. Reg. 4670, 4674 (1994) (recommending that APA be amended to allow comment periods of "no fewer than 30 days"). The proposed amendment would not directly apply to direct final rulemaking proceedings, of course, if those proceedings are seen as falling within the good cause exemption of § 553(b)(B). *See also* 59 Fed. Reg. 48,762 (1994) (allowance by RSPA of *eight days* for public to comment on extension of compliance date of infectious substances regulation).

[104] *See* ACUS Recommendation 93-4, 59 Fed. Reg. at 4674 n.46.

[105] *See* Donnelly, *supra* note 6 (quoting a public interest lawyer as suggesting a ninety-day time frame).

[106] *See supra* note 23 and accompanying text.

[107] 59 Fed. Reg. 24,054, 24,054 (1994).

This potential detriment to public participation must, of course, be weighed against the agency's interest in further expediting the direct final rulemaking process. Yet the incremental savings to the agency from the new EPA approach seem fairly limited. After all, that approach is no more efficient than the standard direct final rulemaking process in cases in which the rule proves to be noncontroversial. In fact, the agency winds up worse off in such cases, because hindsight reveals that the "companion" notice was published needlessly. The savings of time and resources accrue only in the situation in which the agency's prediction proves erroneous and the rule must be withdrawn — and if direct final rulemaking is being used properly, that situation ought to be relatively rare.

D. The Definition of "Adverse Comment"

The Agriculture and FAA procedures for direct final rulemaking contain helpful definitions of the kind of "adverse comment" that should induce an agency to withdraw a direct final rule.[109] Each makes the straightforward points that a comment that proposes a change in the rule would meet this standard, and a comment approving of the rule as published would not. One might, however, raise a question about the FAA's statement that a "comment recommending a rule change in addition to the direct final rule would not be considered an adverse comment, unless the commenter states that the rule would be inappropriate as published or would be ineffective without the additional change."[110] This phrasing is slightly ambiguous. It should be interpreted to mean (or reworded to say) that a comment could be considered adverse not only if it states that the rule would be *intrinsically* inappropriate without a change, but also if it states that the agency would be *acting* inappropriately if it were to adopt the rule without change.

---

[108] In ordinary APA rulemaking, when an agency receives comments and decides to modify a proposed rule, interested persons who had been satisfied with the original proposal, and therefore had refrained from commenting on it, are not normally entitled to a second chance to participate. American Medical Ass'n v. United States, 887 F.2d 760, 769 (7th Cir. 1989). In direct final rulemaking, however, in which the *agency itself* predicts that the rule will be noncontroversial, an interested person who relies on the prediction can make a somewhat stronger equitable argument that the agency should provide a renewed opportunity for comment if the prediction proves mistaken.

[109] *See supra* notes, 33, 43 and accompanying text.

The distinction is subtle, but the underlying concern is to take account of a commenter who says, in effect, "this is fine as far as it goes, but it would be a bad idea for you to do this and no more." Private parties understand that when an agency has adopted one rule on a subject, inertia often takes hold, causing the agency to leave the subject alone for an indefinite period of time. Consequently, commenters who wish to see an agency take large steps have a strong interest in pressing that point at the very time when the agency intends to take small ones. Receipt of such a comment should trigger a rulemaking proceeding in which the commenter's position can be examined carefully (and in which others can make a case *against* the agency's going beyond its original rule).

Indeed, courts expect an agency to respond persuasively to comments urging it to take more dramatic actions than the one it did take; the failure to do so may be an abuse of discretion.[111] To be sure, an agency has broad discretion to set its agenda and to deal with problems one step at a time.[112] Nevertheless, the agency's self-interest lies in making a strong record to respond to pleas to go further than it would prefer; brushing such comments aside can be counterproductive. Administrative policies setting a framework for direct final rulemaking should leave room for such records to be built.

Admittedly, however, these fine distinctions about the phrasing of a general policy may seem overly subtle. In the end, agencies will inevitably have to make periodic judgment calls in individual cases in order to decide whether a given comment is "adverse." Probably the agency should expect the commenter to display some minimum level of seriousness of purpose. One can easily imagine, in this age of widespread anti-government feeling, an individual who might decide to file routine, indiscriminate objections to direct final rules, without providing a substantive basis for the objections. An agency could hardly be asked to allow the direct final rulemaking process to be held hostage to such obstructionism. One benchmark the agency might use, in deciding whether a comment rises to the level of "adverseness," would be whether the agency would have paid any serious attention to the comment, and responded to it, if it had received the comment in an ordinary rulemaking proceeding.[113] Again, however, case-by-case judgment seems unavoidable in this situation.

---

[110] 59 Fed. Reg. at 50,677.

[111] *See* State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 486-89 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); Public Citizen v. Steed, 733 F.2d 93, 99 (D.C. Cir. 1984); ILGWU v. Donovan, 722 F.2d 795, 815-18 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

[112] *See* Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos., 498 U.S. 211 (1991); Heckler v. Chaney, 470 U.S. 821, 831-32 (1985); FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976).

E. Confirmation Notices

The most conspicuous difference in agencies' approach to direct final rulemaking is that the Agriculture agencies and the FAA, if they receive no adverse comments or notice of intent to file one, will publish a notice informing the public that they intend to let a direct final rule stand, while EPA's uniform practice is to the contrary. Agencies that adopt direct final rulemaking in the future will have to choose between these two models. The legal considerations that might bear on this choice have already been discussed.[114] The following discussion puts the legal points aside and examines confirmation notices from a more practical standpoint.

The practice of publishing a confirmation notice has obvious appeal in terms of minimizing uncertainty and confusion among members of the public, who are spared the need to watch the Federal Register for an indefinite period.[115] Agencies must consider the strength of this argument in particular contexts. Relevant to the inquiry would be questions such as: Absent a confirmation notice, how easily could an interested person find out the status of the rule (e.g., through an industry newsletter, telephone contact with the agency, etc.)? To what extent would anyone's primary conduct or decisions be affected by timely knowledge as to the rule's status?[116]

The costs to the agency of a confirmation notice are, in the first instance, economic, because Federal Register filings are charged against the issuing agency's budget. The price is low, because a confirmation notice is usually only a few inches in length;[117] but if the agency were to issue numerous direct final rules, as EPA does, the combined expense could at some point "add up to real money."[118] More important, perhaps, is the effort and delay that may result from the inclusion of an extra step in the direct final rulemaking process. Certainly, the desire to avoid the need for a second series of reviews by responsible agency personnel is one of the principal reasons to use the process. An agency should, however, be able to minimize this cost by structuring its internal processes so that the issuance of a confirmation notice is a ministerial task that an employee without policymaking responsibility can perform.

---

[113] *See, e.g.*, Center for Auto Safety v. Peck, 751 F.2d 1336, 1355 n.15 (D.C. Cir. 1985) (agency need not respond to remote or insignificant comments); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) ("lack of agency response or consideration becomes of concern" when comment is "significant enough to step over the threshold requirement of materiality"), *cert. denied*, 417 U.S. 921 (1974).

[114] In brief recapitulation, if the agency treats direct final rulemaking as substantial compliance with the APA, reviewing courts might deem the use of a confirmation notice necessary to satisfy the requirement of a statement of basis and purpose (although this argument seems unsound) and also to provide a benchmark by which to measure the required thirty-day period preceding the rule's effective date. If the agency can succeed in invoking the good cause exception of section 553(b), the former argument would certainly not apply, and the latter might not, although that is less clear.

[115] It can also provide an occasion to make clarifications or technical corrections in the rule. *See supra* note 79.

[116] According to the Acting Director of the Federal Register, Richard Claypoole (interviewed May 2, 1995), members of the public do call his office with some frequency to ask whether a direct final rule has become final.

The ability to streamline the confirmation notice function may not rest entirely with the agency, however. It is unclear whether an agency's decision to publish a confirmation notice could in some instances trigger a new review by the Office of Information and Regulatory Affairs (OIRA).[119] Avoidance of such a review seems essential if direct final rulemaking is to achieve the streamlining that it is supposed to bring about. One would hope, therefore, that OIRA would be willing to forgo review at the confirmation notice stage in any rulemaking proceeding in which the agency has elected to proceed by direct final rule. This would not detract from the substantive authority of the oversight office; it would merely mean that the office would need to do its review up front, with the understanding that a second review would not occur if no member of the public wishes to submit an adverse comment. Of course, OIRA generally has an interest in conserving its resources by not reviewing rules in an early stage of their development; but, given the agencies' incentive not to resort to direct final rulemaking at all unless adverse comments from the public are unlikely, it would seem logical for OIRA to treat direct final rules as "ripe" for a one-time-only review when they are first promulgated.[120]

---

[117] *See, e.g.*, the APHIS confirmation notices cited in notes 36-39- *supra*. The Government Printing Office charges agencies $125 per column (or $375 per page), although some agencies can obtain a lower price by submitting copy in electronic form. Since charges cannot be prorated among columns, a confirmation notice will probably cost $125 or $250 in most cases. Claypoole interview, *supra* note 116.

[118] A more intangible cautionary factor may be that some members of the public evaluate agency performance by referring to the total number of notices (or pages) the agency publishes in the Federal Register in a given year. Agencies sensitive to such perceptions thus have an incentive to shun inessential notices.

[119] In general, OIRA reviews only rules it considers "significant," which would seem to exclude most direct final rules; but it has no firm policy exempting direct final rules from review.

[120] A similar analysis would apply to any other reviewers of the rulemaking process outside the agency itself. For example, a bill passed by the House of Representatives would entrust a broad reviewing role to the Chief Counsel for Advocacy of the Small Business Administration. *See* H.R. 9 (as amended by insertion of text of H.R. 926), 104th Cong., 1st Sess. § 102, 141 CONG. REC. H2630 (1995).

F. Length of Time Allowed Before Rule Becomes Effective

As explained earlier, agencies may be required to delay the effective dates of their direct final rules to a later time than they have generally assumed, in order to comply with the thirty-day period of section 553(d).[121] Whether or not that is so, the thirty-day requirement is merely a legal minimum.[122] Agencies using direct final rulemaking must make a situation-specific judgment about the length of time that regulated persons realistically need to adapt to a newly announced rule. To date there appears to be no direct evidence that the customary sixty days has proved inadequate in any context, but in some situations a longer period might be desirable. Agencies have broad, but not completely unfettered,[123] discretion to choose a time period that accommodates the need for expedition with the need for fairness to those who must conform to the new regime.

IV. Recommendations and Conclusion

Direct final rulemaking is still in its early stages. Agencies have not used it for enough time and in enough different contexts to allow anyone to be confident that all the potential problems have already come to light. Nevertheless, the foregoing study seems adequate to permit several generalizations about the practice. First, the direct final rulemaking technique seems to be serving valuable functions. Second, current practice rests on a defensible legal foundation, and acceptance of even the most pessimistic assessment of the legal constraints on direct final rulemaking would require only small adjustments in current practice. Third, the models for the use of direct final rulemaking developed by the three agencies that have already made a commitment to the technique seem broadly appropriate, although many of the specific details can only be resolved on a case-by-case basis.

By their nature, the issues surrounding direct final rulemaking do not seem cosmic, even when measured against what Judge (now Justice) Scalia once flippantly called "the regrettably limited cosmos of administrative procedure."[124] The device cannot be used at all except for rules that are unlikely to be controversial. Still, it deserves much broader use in the federal government than has yet occurred, and one can expect that over time its value will become recognized. It is, indeed, rulemaking made simple.

---

[121] *See supra* Part II.C.

[122] *See* National Ass'n of Indep. T.V. Producers & Distributors v. FCC, 502 F.2d 249, 254 (2d Cir. 1974); APA LEGISLATIVE HISTORY, *supra* note 60, at 201 (Senate), 259-60 (House).

[123] *See National Ass'n of Indep. T.V. Producers*, 502 F.2d at 252-55 (holding that FCC abused its discretion by allowing industry insufficient time to adapt to new regulation before its effective date).

[124] Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, v (Summer 1982).

Report for Recommendation 95-4

Interim-Final Rules

Michael R. Asimow
Professor of Law
University of California at Los Angeles
School of Law

This report was prepared for the consideration of the Administrative Conference of the United States. This and the preceding report by Ronald M. Levin are in support of Recommendation 95-4. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

I. INTRODUCTION 481
II. INTERIM-FINAL RULES IN FEDERAL ADMINISTRATIVE PRACTICE 483
  A. Why Agencies Use Interim-Final Rules 483
  B. Increasing Use of Interim-Final Rules 485
  C. Quality of Public Comments on Interim-Final Rules 486
III. LEGALITY OF INTERIM-FINAL RULES 487
  A. The Good Cause Exception 487
  B. Finalizing an Interim-Final Rule 492
  C. Shelf-life 493
IV. ANECDOTAL CRITICISM OF INTERIM-FINAL REGULATIONS 494
  A. INS Employer Sanctions 494
  B. The Passive Loss Regulations 495
  C. Informed Consent 495
V. RECOMMENDATIONS 496
  A. Making Post-Adoption Comment Mandatory 496
  B. Shelf-life of Interim-final Rules 499
  C. Statutory Provision for Interim-final Regulations 502
  D. Permanent Rules That Supplant Interim-final Rules 503
VI. CONCLUSION 505

I. Introduction

This study concerns rules[1] adopted by federal agencies that are immediately effective but that invite post-effective public comment. The agency intends to modify the rule in light of such comments. The agency dispensed with prior notice and comment in reliance on an exception to the Administrative Procedure Act's normal rulemaking requirements[2]—usually the good cause exception.[3] Such rules are often referred to as "interim-final rules."[4]

Interim-final rules have become a generally accepted and commonly used technique in the federal administrative establishment.[5] The Administrative Conference has already gone on record in favor of the use of interim-final rules when an agency has properly invoked the good cause exception.[6]

---

[1] The words "rule" and "regulation" are synonymous. The words are used interchangeably in common parlance and in this article.

[2] The APA requires public notice and an opportunity for comment before a rule is adopted. 5 USC §553. The APA will be referred to herein without the prefatory 5 USC

[3] APA §553(b)(B) and (d)(3). The APA rulemaking provisions contain no exception for interim-final rules. They can be adopted only pursuant to some other APA exception, such as the good cause provisions. I have been told that interim-final rules are used so frequently that some government employees think there is a special APA exception for them.

An interim-final rule might be adopted without prior notice and comment but not be effective for thirty days after publication in accordance with the normal rules of APA §553(d). In other words, an agency might take advantage of the §553(b)(B) exception but not the §553(d)(3) exception. The analysis in this paper applies to such rules.

[4] One district court referred to the phrase "interim-final" as an oxymoron. The court couldn't figure out whether the phrase means that the rule is the final version of a rule that applies only for an interim period or whether it is an interim version of a rule intended to apply indefinitely. Analysas Corp. v. Bowles, 827 F. Supp. 20, 21 n.3 (D.D.C. 1993). This article focuses on the latter type of rules: the rule is intended to apply indefinitely but has been adopted in an interim form that will be reconsidered and modified in light of public input.

They are also sometimes called "interim rules" or "final rules with comments requested." Sometimes they are called "final rules" but the Federal Register notice nevertheless invites comments.

[5] The nickname "interim-final" is a peculiar one, but it has achieved general currency. A Lexis search on April 13, 1995, disclosed that federal courts have used the terms "interim-final rule" or "interim final regulation" in 182 opinions.

A similar search of the Federal Register indicated that those words were used 1095 times when combined with the date 1991; 1085 times when combined with the date 1992; 1093 times when combined with the date 1993; 873 times when combined with the date 1994; and 452 times when combined with the date 1995 (since the search was done on April 13, 1995, obviously fewer listings would appear in which the year 1995 appeared).

[6] ACUS Recommendation 83-2, 1 CFR §305.83-2, calls for a post-promulgation comment opportunity when an agency has found that prior notice and comment would be "impracticable" or "contrary to the public interest," but not where prior comment was "unnecessary." A final rule should be adopted "within a reasonable time" after close of the comment period and include a response to significant and relevant issues raised by the public comment.

Recommendation 83-2 also calls on agencies adopting rules under the good cause exemption to consider: a) framing the rule as narrowly as possible, b) developing general criteria to be applied by the agency in foreseeable, recurring situations that require emergency action, c) the use of interim rules to be followed by an amended rule that

This study does not focus on several other types of rules that are related to interim-final rules. For example, it does not consider "temporary" rules,[7] meaning ones that will be in effect only for a limited period—usually quite brief—before lapsing at a date set forth in the rule. It does not consider rules (even though they are also called interim-final) that are adopted after normal pre-adoption APA notice and comment procedure.[8] Nor does it consider so-called direct-final rules.[9]

This study discusses the reasons why agencies use interim-final rules and reports the results of an empirical study of what happens to such rules. It discusses the legal constraints on adoption of interim-final rules. It compiles some anecdotal accounts of flaws in interim-final rules. Finally, it makes some recommendations.

---

is adopted after complying with notice and comment requirements, and d) taking alternative steps to obtain the views of interested persons before adopting the interim rule.

Recommendation 83-2 is consistent with the legislative history of the APA which urged agencies to use post-adoption comment in the case of rules adopted under the good cause exemption. Administrative Procedure Act, Legislative History 200, 258 (S. Doc. 248, 79th Cong. 2d Sess.): "It should be noted that where authority beneficial to the public does not become operative until a rule is issued, the agency may promulgate the necessary rule immediately and rely upon supplemental procedures in the nature of a public reconsideration of the issued rule to satisfy the requirements of this section."

[7] Some agencies, such as the Internal Revenue Service, use the term "temporary" to refer to rules that this paper describes as "interim-final." *See* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX. LAW. 343 (1991).

[8] This type of rule is employed when a final rule diverges significantly from the proposed version. Rather than return to square one with a re-proposed rule, the agency adopts an interim-final rule, requesting comment on the portion of the final rule which varies from the proposed rule. E.g., Interim rule adopted by Commodity Credit Corp., 56 Fed. Reg. 41431 (Aug. 21, 1991); Interim rule adopted by the Department of Defense, 56 Fed.Reg. 36280 (July 31, 1991).

The agency may genuinely want public input on the new approach taken in the final rule. It may also fear that the public did not receive adequate notice with respect to the change; it hopes that the opportunity for post-adoption comment might cure the procedural defect. *See, e.g*, Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994) (interim rule contains important change not mentioned in proposed rule—rule invalid). *See also* text at notes 54-58 discussing whether post-adoption comment on a rule adopted without any prior notice and comment might validate the rule despite failure to meet the standards of the good cause exception.

[9] A direct final rule is published in the Federal Register with a notice that explains that the rule will become effective at a future date (usually in 60 days), unless, by a deadline date (usually 30 days), the agency receives notice from any person of an intention to file adverse or negative comments. If such notice is received, the agency is required to withdraw the direct final rule, republish it as a proposed rule, and go through the usual notice and comment procedure.

This useful innovation, employed by the Environmental Protection Agency and several others, dispenses with comment periods and the attendant expense and delay when nobody is interested in commenting. Thus it is a substitute for the adoption of a rule under the "unnecessary" prong of the good cause exception, but provides assurance that the comment period is really unnecessary. *See* Ronald M. Levin, "Direct Final Rulemaking" (ACUS Study March, 1995); Office of the Vice President, "Improving Regulatory Systems," Report Accompanying the National Performance Review 42-44 (Sept. 1993).

II. Interim-Final Rules in Federal Administrative Practice

A. Why Agencies Use Interim-Final Rules

Interim-final rules can, where legally authorized, strike a pragmatic compromise between the costs and delays inherent in complying with the rulemaking provisions of the APA and the public benefits that accrue from complying with those provisions. The familiar APA rulemaking provisions call for agencies that contemplate the adoption of a rule to first give notice of the proposed rule, invite public comments, consider the comments, and only then adopt a final rule.[10] The rule becomes effective no earlier than 30 days after it is adopted.[11]

The public benefits of pre-adoption public participation are well known:[12] the input that it provides to rulemaking agencies often results in better rules. Rules adopted with public participation are likely to be more effective and less costly to administer than rules written without such participation. They are more likely to deal with unexpected and unique applications and are more politically acceptable to the persons who must live with them. Beyond these utilitarian calculations, notice and comment procedure serves fundamental democratic purposes. A rulemaking agency is making new law without direct accountability to the voters; notice and comment procedure helps to alleviate the undemocratic character of this process. It provides a channel that allows interested persons to have a say about the rules that will govern their lives and requires the agency to read and respond to their comments. It also enhances the ability of Congress and the President to provide oversight of the rulemaking process.[13]

However, APA rulemaking procedure is commonly perceived as becoming ever more cumbersome and costly.[14] For reasons of expedience, the APA provides for numerous exceptions to its rulemaking requirements. For purposes of this study, the most significant such provision[15] is the "good cause" exception:

---

[10] APA §553(b), (c).

[11] APA §553(d).

[12] *See, e.g*, 1 Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 260-66 (3d ed. 1994).

[13] Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

[14] Thomas O. McGarity, *Some Thoughts on 'DeOssifying' the Rulemaking Process*, 41 DUKE L. J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 73-75 (1995); Colloquium, 8 ADMIN. L. J. AM. U. 23, 39-52 (rulemaking within Energy Department may take five years).

[15] Numerous other APA exceptions reflect a similar Congressional judgment that pre-adoption notice and comment procedure is not worth its cost or would create practical difficulties. These procedures are inapplicable to military and foreign affairs functions, to matters relating to agency management or personnel, and to public

no pre-adoption procedures are required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[16] A comparable good cause provision allows the agency to dispense with the normal thirty-day pre-effective date period.[17] This study focuses on interim-final rules adopted without prior public participation under the impracticable or contrary to the public interest prongs of the good cause exemption.[18]

Thus interim-final rules strike a compromise between a perceived need for immediate adoption of a rule and the values of public participation in rulemaking. With interim-final rules, an agency captures some but not all of the benefits of pre-adoption public comment. It also captures some but not all of the cost and time savings of adopting a rule without any public participation at all.

Thus an agency that chooses to rely on interim-final rules does so as the result of a two-step analytical process. First, the agency decides that it is legally entitled to adopt a rule without engaging in the normal process of pre-adoption public participation. Although several APA exceptions might apply, normally the occasion for adopting an interim-final rule is the presence of some exigency that provides good cause for dispensing with public participation.[19]

Second, the agency decides that it should solicit post-effective comment on the immediately-effective rule. In many cases, the agency has a tactical reason for inviting comments: the fact that the agency solicited and considered the comments in good faith might persuade a court that the agency's good cause claim was justified.[20]

In addition to this tactical consideration, agencies genuinely wish to adopt rules that are as effective, efficient, and widely accepted as possible. They are well aware that public commentary helps achieve these objectives by pointing out overlooked alternative approaches or other flaws in the rule and by increasing the

---

property, loans, grants, benefits, or contracts. APA §553(a). They are also inapplicable to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. APA §553(b)(B).

[16] APA §553(b)(B). *See generally* Jordan, *The Administrative Procedure Act's Good Cause Exemption*, 36 ADMIN. L. REV. 113, 120-41 (1984).

[17] APA §553(d)(3).

[18] Thus this study and its attendant recommendations do not cover, except incidentally, interim-final rules adopted under APA exemptions other than good cause. *See, e.g.*, Chai v. Carroll, __ F.2d __, 1995 U.S.App. Lexis 4338 (4th Cir. 1995) (interim rule was a general statement of policy and therefore could be revoked without notice and comment). Similarly, it does not cover, except incidentally, interim-final rules adopted after a pre-adoption notice and comment procedure. *See* note 9. Finally, it does not cover rules adopted under the unnecessary prong of the good cause exemption.

[19] See further discussion of the good cause exception in Part IV. Normally, the exigent circumstances will cause the agency to dispense with the 30-day pre-effectiveness requirement as well as the pre-adoption procedure requirement.

[20] *See* text at notes 48-49.

extent to which commenters buy into the rule. Therefore, they are willing to shoulder the costs of soliciting and considering comments and revising the rule in light of the comments.

B. Increasing Use of Interim-Final Rules

Interim-final rules have become part of the rulemaking routine.[21] Thus President Clinton's proposed Health Security Act provided authority for the National Health Board, the Secretary of Health and Human Services, and the Secretary of Labor to issue interim-final regulations, subject to change based on subsequent public comment.[22]

To document the prevalence of interim-final rules, I searched the Federal Register for two quarters: the first quarter of 1989 and the third quarter of 1991. I also searched the Register for the month of April 1994. I counted all interim-final rules I found, excluding mere corrections or rules that expired by their own terms within a relatively short period of time.[23] Then I tracked each of the interim-final rules adopted in 1989 and 1991 to see whether it had been made final within three years after it was adopted.[24]

There were 92 interim-final rules adopted in the first quarter of 1989. As of February 1992, 49 of these had been made final (with or without modifications), one had been dropped, and 42 (or 46%) remained outstanding as interim-final rules. In the third quarter of 1991, agencies adopted 90 interim-final rules; 50 had been made final as of November 1994, 2 were dropped, and 38 (or 42%)

---

[21] *See* note 6.

[22] H.R. 4, §1911 (103d Cong. 1st Sess.).

A number of other statutes provide for interim rules:

a) The Social Security Amendments of 1983, 97 Stat. 65, 168 (1983), authorized interim final rules, effective September 1, 1983, to implement the new Medicare prospective payment system. The rules were effective for reimbursements made after October 1, 1983. The Secretary was instructed to invite comments and to modify or affirm the rules in light of comments by December 31, 1983. *See* Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1235-38 (D.C. Cir. 1994).

b) Interim rules were provided for in the provisions relating to Medicaid expenditure reductions in 1981. P. L. 97-35, §2161(a), applied in Coalition of Michigan Nursing Homes, Inc. v. Dempsey, 537 F.Supp. 451, 457-59 (E.D.Mich. 1982).

c) The Department of Energy can adopt emergency rules but must provide notice, comment, and oral argument within a reasonable period after adopting the rules. 42 USC §7191(e).

d) Emergency mine safety rules must be accompanied by a notice of proposed rulemaking. The agency has nine months to enact final rules. 30 USC §811(b)(3).

e) A provision in an appropriations act legitimated existing EPA interim-final rules, thus mooting judicial review of the validity of their adoption. *See* Mobil Oil Corp. v. EPA, 35 F.3d 579 (D.C.Cir. 1994).

[23] Some of those that I regarded as merely temporary include Coast Guard regulations relating to repairs of a particular drawbridge or closure of a river for boating because of a fireworks show or Department of Commerce rules closing a fishery for the season.

[24] If ACUS wished to devote additional resources to this study, it might consider surveying the comment files on these rules.

remained outstanding as interim-final rules.[25] During that same quarter, there were 46 final rules adopted under the good cause exemption which did not seek post-promulgation comments.[26] Thus interim-final rules outnumbered final rules adopted under the good cause exemption by about two to one.[27]

Interim-final rules continue to be heavily used. In April 1994, there were 27 interim-final rules,[28] compared to only five rules adopted under the good cause exemption without inviting post-adoption comment.

C. Quality of Public Comments on Interim-Final Rules

In evaluating the arguments about the adequacy of public input on interim-final regulations, a critical question is whether such a regulation attracts as much public comment, and as thoughtful public comment, as a proposed regulation. When a rule has already gone into effect, some potential commentators may not bother to submit comments on it. They may assume that the rule is fixed and that it is not worth taking a lot of time or paying a professional to prepare comments on it. It may make more sense to just take the rule as fait accompli and accommodate to it. On the other hand, interim-final regulations may elicit more and better comments since an immediately-effective regulation may be taken more seriously by the persons affected by it than a proposed regulation that may never go into effect or won't go into effect for a long time.

Of course, it is difficult to offer any empirically based answer to this question. There is no typical rule with respect to which one can compare the response rates based on whether the rule was interim-final or proposed. When I asked about comment on interim-final tax regulations,[29] the unanimous view of Treasury and IRS officials, as well as numerous private-sector professionals, was that there is no discernible difference in the quality and quantity of public input as between the two.[30]

---

[25] Twelve interim-final rules adopted during this quarter and included in the figures cited in text were airworthiness directives of the FAA mandating particular safety checks on aircraft. Six of the FAA interim-final airworthiness regulations were subsequently made final. *See* note 91 for discussion of airworthiness directives. Arguably, these should be dropped from consideration.

[26] Eighteen of these were airworthiness bulletins. I did not count rules adopted under the "unnecessary" prong of good cause, only those under the "impracticable" or "contrary to the public interest" prongs.

[27] Or better than 3-1 if airworthiness directives are excluded.

[28] The number of interim-final rules adopted in April 1994, was probably a bit lower than normal because of the effort involved in getting out the Unified Agenda of Federal Regulations on April 25. This resulted in somewhat less rulemaking activity during late April (indeed the Register skipped one day of publication).

[29] Asimow, Temporary Tax Regulations, note 8 at 366-67. Treasury calls these temporary regulations but they fit this paper's criteria as interim-final regulations.

[30] Neil Eisner of the Department of Transportation believes that less comment is received on interim-final rules than on proposed rules.

However, there may be a difference in an agency's receptivity to the comments that it does receive. Once an agency has decided on a definitive rule and the rule has gone into effect, the staff may be less willing to make substantial alterations in the rule (and retrain enforcement personnel) in response to comments that suggest drastic changes in the rule.[31] The staff's response may be a defensive one—to dismiss all but the most compelling (or the most trivial) comments as not worth the price of trying to fix the rule. Staff may also be concerned that any changes could disappoint reliance interests. Obviously, there is no way to know whether agency staff really treat post promulgation comments more dismissively than pre-promulgation comments—it's pure speculation.

III. Legality of Interim-Final Rules

A. The Good Cause Exception

In order to dispense with pre-adoption public participation, an agency must qualify under an APA rulemaking exception. Absent such an exception, a rule adopted only with post-adoption participation is procedurally invalid. There is, in other words, no APA exception for interim-final rules. Prevailing judicial doctrine holds that post-adoption procedure is inferior to pre-adoption procedure and the defect is not harmless error.[32]

---

[31] Neil Eisner believes that staff are more reluctant to make changes in an interim-final rule than in a proposed rule, but that may be because proposed rules leave more options open than interim rules.

Some present and former Treasury and IRS officials acknowledged that they might be less willing to make changes in interim as opposed to proposed rules. That is also the view of numerous tax professionals with whom I have spoken. Temporary Tax Regulations, note 9 at 367.

I do not mean to overstate this argument, however. An agency tends to be unwilling to make changes in proposed as well as temporary rules, since in either case staff members have a large time investment in their work product.

[32] *But see* Cal-Almond, Inc. v USDA, 14 F.3d 429, 441-42 (9th Cir. 1993) (agency failed to meet good cause standard but rule valid because error harmless).

As the Fifth Circuit said in support of the general rule:

> EPA argues that even if it was obliged to afford opportunity for §553 notice and comment before making the designations, its failure to do so was cured by its acceptance of comments after the effective date. The argument mixes notions of mootness, harmless error, and minimal injury to petitioners. While the substantial public health interests involved give these arguments some surface appeal, accepting them would lead in the long run to depriving parties affected by agency action of any way to enforce their §553 rights to pre-promulgation notice and comment.
>
> Essentially the argument is that despite its lack of literal compliance with §553 the EPA satisfied the intent of §553 by accepting post-promulgation comments and keeping an open mind about revisions. The EPA overlooks, however, the crucial difference between comments before and after rule promulgation. Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas...

Most interim-final rules are adopted under authority of the "good cause" exception to section 553 of the APA.[33] Under the APA, notice and comment are not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[34] By invoking good cause, the agency's legal position is that no public participation is required at any time; the agency voluntarily undertakes the burden of soliciting and considering post-adoption comment.

Numerous judicial decisions, well supported by the legislative history, establish that the good cause provision is narrowly construed.[35] Courts make an independent judgment about whether it applies and do so on a contextual, case-by-case basis. Only in compelling situations will a court subordinate the values embodied in public participation[36] to claims of administrative necessity.[37]

> Were we to allow EPA to prevail on this point we would make the provisions of §553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.

U.S. Steel Corp. v. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979). *See also* Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979) (invitation for post-promulgation comment does not comply with APA requirements for adoption of legislative rule); National Tour Brokers Assn. v. United States, 591 F.2d 896, 902 (D.C.Cir. 1978); Wagner Elec. Co. v. Volpe, 466 F.2d 1013, 1020 (3d Cir. 1972); Hedge v. Lyng, 689 F. Supp. 884, 889 (D.Minn. 1987).

[33] A minority of interim-final rules are adopted in reliance on other exemptions such as military and foreign affairs or contracts, grants, and benefits. A longstanding provision allows the Interstate Commerce Commission to adopt emergency rules relating to railroads. 49 USC §11123(1)(a), (2). *See* ICC v. Oregon Pacific Industries, Inc., 420 U.S. 184, 193 (1975) (Powell, J., concurring) (ICC should be required to use normal notice and comment procedure once emergency abates); United States v Southern Ry Co., 380 F.2d 49, 55 n.17 (4th Cir. 1967) (defining emergency). A similar provision applies to emergencies relating to fishery management. 16 USC §1855(c); Parravano v. Babbitt, 837 F. Supp. 1034 (N.D.Cal. 1993).

[34] APA §553(b)(B). Similarly, the thirty-day, pre-effective date provision does not apply "as otherwise provided by the agency for good cause found and published with the rule." APA §553(d)(3). The two good cause provisions in §553 are different and are applied independently. This article pays relatively little attention to §553(d)(3). *See generally*, Jordan, note 17 at 141-52. The §553(d)(3) good cause standard is easier to satisfy than the §553(b)(B) good cause standard. *See e.g.*, Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485-87 (9th Cir.), *cert.den.* 113 S.Ct. 598 (1992) (§553(d)(3) satisfied but §553(b)(B) not satisfied). When the §553(d)(3) standard is not satisfied, the normal remedy is simply to defer the effective date of the rule until the 30-day period passes, rather than to invalidate the rule. *See, e.g.*, Prows v. DOJ, 938 F.2d 274 (D.C. Cir. 1991).

[35] The exemption is not to be an "escape clause" from required procedures. "A true and supported or supportable finding of necessity or emergency must be made and published." Administrative Procedure Act Legislative History, S. Doc. 248, 79th Cong. 2d Sess. 200, 258 (1946) (hereinafter "APA Legislative History"). *See, e.g.*, New Jersey v. EPA, 626 F.2d 1038, 1045-47 (D.C.Cir. 1980).

[36] *See* text at notes 13-14.

[37] *See generally* Lavilla, note 28 at 333-50; Jordan, note 17 at 120-41; Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes 'Good Cause' Under the Administrative Procedure Act*, 1980 B.Y.U. L. REV. 93.

To establish that notice and comment procedure would be "impracticable" or "contrary to the public interest,"[38] the agency must show exigent circumstances. For example, an imminent implementation deadline imposed by a statute[39] or judicial decision[40] or an emergency (such as a serious public health problem) might qualify as good cause.[41] Similarly, notice and comment can be dispensed with when those procedures would thwart the statutory purpose.[42] However, the good cause test is not met simply because an agency wishes to adopt immediately-effective rules to provide guidance or simplify enforcement.[43]

---

[38] Rulemaking procedure is "impracticable" if "the due and required execution of agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings." The phrase "contrary to the public interest" is one that "supplements the terms 'impracticable' or 'unnecessary;' it requires that public rulemaking procedures shall not prevent an agency from operating and that on the other hand, lack of public interest in rulemaking warrants an agency to dispense with public procedure." APA Legislative History, note 36 at 200, 258. According to the authoritative Attorney General's Manual, "contrary to the public interest" includes "situations in which the interest of the public would be defeated by any requirement of advance notice." U. S. Dept of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947).

[39] Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (urgent deadline, very complex statute); Sepulveda v. Block, 782 F.2d 363, 366 (2d Cir. 1986) (statute effective immediately, legislative history indicates dissatisfaction with slow pace of implementation of prior statute); Petry v. Block, 737 F.2d 1193, 1200-02 (D.C. Cir. 1984) (very short deadline for implementation of statute—diligent effort by understaffed agency to meet it). *See generally* Eleanor Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855, 875-99 (1990) (Congress passed immediately effective statutes which required implementing regulations).

Yet even in cases involving intense time pressures, the courts have rejected claims based on the good cause exemption, lest agencies be encouraged to procrastinate until just before the deadline. As one court noted: "This rationale [the good cause exception] is one that permits avoidance of APA procedures only in exceptional circumstances. Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures. Because of this possibility for abuse, 'the mere existence of deadlines for agency action...[can] not in itself constitute good cause for a §553(b)(B) exception.'" Council of Southern Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981). Similarly, *see* Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979).

[40] American Federation of Government Employees v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (upholding rule only if it applied temporarily rather than permanently).

[41] *See, e.g.*, Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 750-52 (10th Cir. 1987) (urgent need for hunting regulations where season had begun and herds could dwindle to extinction); Northwest Airlines v. Goldschmidt, 645 F.2d 1309, 1321 (8th Cir. 1981) (urgent need to allocate landing slots at National Airport).

[42] Several cases applied the exemption to the imposition of wage and price controls, or to permission to increase prices, since advance warning of the rules would have triggered pre-effective date price increases or withholding of supplies. Yet courts did not accept such claims with respect to later phases of the control programs. *See* Jordan, note 17 at 120-22.

The generic argument that an interim-final rule is needed to forestall a regulatory rush to beat the deadline is not persuasive, absent a detailed factual showing that such a rush would undermine the purposes of the applicable legislation. Tennessee Gas Pipeline Co v FERC, 969 F.2d 1141, 1145-46 (D.C.Cir. 1992); Thrift Depositors of America, Inc. v. Office of Thrift Supervision. 862 F.Supp. 586, 592 (D.D.C. 1994).

[43] *See, e.g.*, Action on Smoking and Health v. CAB, 713 F.2d 795, 801-02 (D.C. Cir. 1983) (fact that existing rule is confusing and difficult for agency to enforce does not provide good cause to adopt new one without prior notice); United States Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979) (providing

Moreover, a court is unlikely to accept a claim of emergency in cases where an agency appears to have been dilatory in adopting the rule.[44] And every provision in the rule must be justified by exigent circumstances; a plaintiff can invalidate a specific provision that was not required by exigent circumstances even if other provisions in the rule were justified.[45]

Generally, the agency must articulate the factual basis for its claim of exigent circumstances when it adopts a rule under the good cause exception, even though the statute calls only for a good cause finding and "a brief statement of reasons therefor in the rules issued." Post hoc explanations are not acceptable.[46]

Suppose that an agency's good cause claim presents a close call. But suppose also that the agency adopted the rule in question as an interim-final rule rather than a final rule.[47] Does the fact that the agency requested and considered

---

guidance for states in drafting air pollution implementation plans is not good cause); Mobil Oil Corp. v. DOE, 610 F.2d 796, 803 (TECA 1979) ("a desire to provide immediate guidance, without more, does not suffice for good cause...an exception to the notice requirement would be created that would swallow the rule"); Analysas Corp. v. Bowles, 827 F. Supp. 20 (D.D.C. 1993) (need for guidance insufficient).

[44] *See, e.g.*, American Iron & Steel Inst. v. EPA, 568 F.2d 284, 291-92 (3d Cir. 1977) (agency had several years to meet judicial deadline and even issued advance notice of proposed rulemaking but couldn't complete rulemaking cycle in time—good cause claim rejected); Air Transport Ass'n of America v. DOT, 900 F.2d 369, 379 (D.C. Cir. 1990), *vacated* 498 U.S. 1077 (1991), 933 F.2d 1043 (D.C. Cir. 1991) (delays caused by attention to other priorities undercuts good cause claim)

[45] *See* United States v. Garner, 767 F.2d 104, 120 (5th Cir. 1985) (provision at issue not justified by good cause even if other portions were justified); Thrift Depositors of America, Inc. v. Office of Thrift Supervision. 862 F.Supp. 586, 591 (D.D.C. 1994) (same).

[46] *See, e.g.*, Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1145-46 (D.C.Cir. 1992) (agency failed to set forth basis for its conclusion that rule had to be effective immediately to avoid environmental damage); United States v. Garner, 767 F.2d 104, 120-21 (5th Cir. 1985). *But see* DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1333 (T.E.C.A.), *cert.den.* 419 U.S. 896 (1974) (omission is mere technical violation where reasons were obvious and compelling). *See generally* Lavilla, note 28 at 399-403 (arguing that the requirement for a reasons statement not be strictly enforced).

[47] Upholding interim-final rules adopted under the good cause exemption: Mid-Tex Elec. Coop. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987); Sepulveda v. Block, 782 F.2d 363, 366 (2d Cir. 1986); Petry v. Block, 737 F.2d 1193, 1200-05 (D.C. Cir. 1984) (rule would probably have been upheld even if no comments had been requested); Nat'l. Fed. of Fed. Gov't Empl. v. Devine, 671 F.2d 607, 610-12 (D.C.Cir. 1982) (interim regulation valid because of emergency, but notice and comment procedure must be completed expeditiously); American Federation of Government Employees v. Block, 655 F.2d 1153, 1155-59 (D.C. Cir. 1981) (agency required to institute new notice and comment procedure rather than rely on a ninety-day post-effective comment period); Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 881-86 (3d Cir. 1982) (but in n. 9, p. 885, court says that if agency lacked good cause the interim rule might not be saved by the 60-day comment period); Republic Steel Corp. v. Costle, 621 F.2d 797, 803-04 (6th Cir. 1980) (careful consideration of comments on interim-final rule is favorable factor).

Invalidating interim-final rules adopted under the good cause exemption: Cal-Almond, Inc. v. USDA, 14 F.3d 429, 441-42 (9th Cir. 1993) (agency failed to meet good cause standard but rule valid because error harmless); Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144-46 (D.C.Cir. 1992); Air Transport Ass'n of America v. DOT, 900 F.2d 369, 378-81 (D.C. Cir. 1990), *vacated* 498 U.S. 1077 (1991), 933 F.2d 1043 (D.C. Cir. 1991) (both temporary and final rule held invalid); Levesque v. Block, 723 F.2d 175, 184-85 (1st Cir. 1983) (need for budgetary savings insufficient); Kollett v. Harris, 619 F.2d 134, 145 (1st Cir. 1980); American Iron & Steel Inst. v. EPA, 568 F.2d 284, 291-92 (3d Cir. 1977); Buschmann v. Schweiker, 676 F.2d 352, 355-58 (9th Cir. 1982) (no good cause to waive 30-day pre-post-adoption comments place a little extra weight on the agency's side of the scales? Some decisions have explicitly recognized that post-adoption comment does strengthen an agency's good cause claim.[48] Other cases seem to ignore this factor completely.[49]

It is helpful in upholding a good cause claim for an interim-final rule if an agency can show that it gave careful consideration to the post-promulgation comments that it received.[50] It is also helpful if the rule is temporary, rather than interim-final: that is, effective only for a precisely limited and relatively brief time.[51] Some cases upholding interim rules under the good cause exception also suggest that the rules are more likely to be upheld if they have a limited reach—in other words, they really aren't too important.[52] But courts caution that the limited reach of the rule is only one factor—it is not true that any minor regulation can be adopted on an interim basis. That would let the exception swallow the rule.[53]

---

effectiveness provision); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979) (EPA could have met schedule for proposed rule); Thrift Depositors of America, Inc. v. Office of Thrift Supervision, 862 F.Supp. 586 (D.D.C. 1994); Analysas Corp. v. Bowles, 827 F. Supp. 20 (D.D.C. 1993); Texas Food Industry Ass'n v. USDA, 842 F. Supp. 254 (W.D.Tex. 1993); American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983) (Baby Doe rule—no emergency).

[48] *See* Mid-Tex Elec. Coop. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987); Tennessee Gas Pipeline Co v FERC, 969 F.2d 1141, 1144-46 (D.C.Cir. 1992) (rule invalid despite being interim); Nat'l. Fed. of Fed. Gov't Empl. v. Devine, 671 F.2d 607, 610-13 (D.C.Cir. 1982); Coalition of Michigan Nursing Homes, Inc. v. Dempsey, 537 F.Supp. 451, 457-59 (E.D.Mich. 1982).

In *Mid-Tex Elec., supra*, the fact that a rule was interim was one of several factors that, taken together, justified a good cause exemption. However, the other factors were fairly compelling: i) an earlier rulemaking proceeding had produced a substantial record, ii) the interim rule was adopted in response to a Court of Appeals decision invalidating a prior rule—but approving most of its substance, iii) the interim rule provided adequate protection for the interests of those who might be harmed by it, iv) the earlier rule and the interim rule together had generated heavy reliance interests, and v) there was a need for continuity of rules for public utility pricing. The court expressed concern lest its tolerance of temporary regulations give the agency an incentive to engage in dilatory tactics during the post-effective comment period. *Mid-Tex* is discussed with approval in Pierce, note 15 at 73-75.

[49] *See, e.g.*, American Iron & Steel Inst. v. EPA, 568 F.2d 284, 292-93 (3d Cir. 1977); Kollett v. Harris, 619 F.2d 134, 145 (1st Cir. 1980).

[50] Nat'l. Fed. of Fed. Gov't Empl. v. Devine, 671 F.2d 607, 610-12 (D.C.Cir. 1982); Republic Steel Corp. v. Costle, 621 F.2d 797, 804 (6th Cir. 1980).

[51] Upholding temporary rules: Council of Southern Mountains, Inc. v. Donovan, 653 F.2d 573, 580-82 (D.C.Cir. 1981) (deferral of effective date of prior regulation for seven-month period); Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 750-52 (10th Cir. 1987) (rule in effect for single game season).

This argument is far less compelling in the case of an interim-final rule that could remain in effect indefinitely. *See* Thrift Depositors of America, Inc. v. Office of Thrift Supervision. 862 F.Supp. 586, 593 (D.D.C. 1994) (since agency could not say when rule would become final because of need for review by OMB and other agencies, this factor was not helpful).

[52] Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1145 (D.C.Cir. 1992). *But see* Thrift Depositors of America, Inc. v. Office of Thrift Supervision. 862 F.Supp. 586, 593 (D.D.C. 1994) (rule has broad scope so greater need for prior input); Analysas Corp. v. Bowles, 827 F.Supp. 20 (D.D.C. 1993) (same).

[53] Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1145 (D.C.Cir. 1992)

A related issue arises where an interim-final rule is superseded by a final rule. Plaintiffs challenge the final rule. Suppose a court finds that the interim-final rule (which is no longer in effect) failed to qualify under the claimed exemption. Does that mean that the final rule is also invalid because the comment period occurred after the interim rule became effective?[54] Or is this mere harmless error because the public had an opportunity to comment on the interim-final rule and that should be viewed as sufficient public participation to validate the final rule? Some decisions have upheld final rules in this situation where the agency met the burden of showing that it had an "open mind" and seriously took account of the comments on the interim-final rule.[55] This is an especially likely result if invalidation of the final rule would present complex remedial problems.[56]

B. Finalizing an Interim-Final Rule

Suppose that an interim-final rule was validly adopted because of the presence of good cause for dispensing with pre-adoption procedures. Then the interim-final rule is made final. The act of modifying and finalizing the rule is itself a rulemaking that must comply with the APA.[57] Normally, there would be no exigent circumstances at the time the interim-final rule is made final. Therefore, the final rule must be preceded by public participation.[58] The invitation for comments that accompanied the final rule generally satisfies this requirement, even though the invitation was not contained in the proposed rules section of the Federal Register.

---

[54] Some decisions invalidate a final rule adopted after an interim-final rule on the theory that the illegally adopted rule discouraged the public from commenting on the proposed final rule. Air Transport Ass'n of America v. DOT, 900 F.2d 369, 379-80 (D.C. Cir. 1990), *vacated* 498 U.S. 1077 (1991), 933 F.2d 1043 (D.C. Cir. 1991); New Jersey v. EPA, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980); United States Steel Corp. v. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979); National Tour Brokers Ass'n v. United States, 591 F.2d 896, 901-03 (D.C. Cir. 1978). *See* Lavilla, *supra* note 28 at 408-10, 412-13; Comment, *Remedies for Noncompliance with Section 553 of the APA*, 1982 DUKE L.J. 461, 471-76. *Cf.* Reeder v. FCC, 865 F.2d 1298, 1304 (D.C.Cir. 1989) (invalidating rule adopted after improper notice despite the receipt of curative comments where inadequate showing that agency's mind remained open); United States v. Garner, 767 F.2d 104, 120-21 (5th Cir. 1985) (rule B lacks proper statement of basis and purpose; it cannot be saved by relying on prior rule A that was invalidly adopted under good cause exception).

[55] Advocates for Highway and Auto Safety v. Federal Highway Administration, 28 F.3d 1288, 1291-93 (D.C.Cir. 1994); Petry v. Block, 737 F.2d 1193, 1203 (D.C.Cir. 1984) (alternative ground); Levesque v. Block, 723 F.2d 175, 187-89 (1st Cir. 1983) (interim rule invalid, final rule valid); Kollett v. Harris, 619 F.2d 134, 145-46 (1st Cir. 1980); Jordan, note 17 at 166-68; Lavilla, note 28 at 412-13.

Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 812-13 (9th Cir. 1980), involved an interim-final regulation, post-promulgation comment, and adoption of a final regulation. The Court declared that it normally would invalidate both the interim and the final rule. However, the court exercised its remedial discretion to leave the final rule in effect pending additional comments by the petitioners. The court did not want to frustrate the operation of the Clean Air Act in California during the deliberative process and was reluctant to intrude excessively into the complex process of environmental regulation. *See also* United States Steel Corp. v. EPA, 649 F.2d 572, 576-77 (8th Cir. 1981); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979).

[56] Petry v. Block, 737 F.2d 1193, 1203-04 (D.C.Cir. 1984) (alternative ground). *See* Federal Land Bank of Springfield v. Farm Credit Adm'n, 676 F. Supp. 1239, 1249-50 (D. Mass. 1987) (dictum) (court might allow rule invalidly adopted under good cause exception to remain in effect as interim rule if effect of vacating it would be disruptive to regulatory scheme).

[57] APA §551(5) (rulemaking means agency process for formulating, amending, or repealing a rule).

Nevertheless, the courts will scrutinize the act of final rulemaking under conventional standards. For example, if the interim-final rule diverged substantially from the interim-final, it could be found that commentators had insufficient notice.[59] Or it might be found that the public had insufficient time to comment.[60] Similarly, the agency must meet the normal standards for responding to comments. If it failed to do so, the rule might be invalidated either because it lacked the appropriate statement of basis and purpose or on the ground that the final rule was arbitrary and capricious.[61]

C. Shelf-life

If an agency adopts a valid interim-final rule, it need not ever make the rule final. Inertia is at work: the rule is in effect, the public complies with it, and the agency staff moves on to other priorities. Many rules hang indefinitely in interim-final limbo.

A special rule applies in tax cases.[62] The Treasury often uses interim-final regulations when it needs to provide immediate guidance to taxpayers. Treasury calls them "temporary regulations," but they are not really "temporary" as the term is used in this article because they apply indefinitely. In 1988, as part of the so-called Taxpayer Bill of Rights, Congress adopted Internal Revenue Code section 7805(e) to compel the agency to issue all temporary regulations simultaneously as proposed regulations.[63] In addition, section 7805(e)(2) provides that any temporary regulation "shall expire within three years after the date of issuance of such regulation." This provision was enacted without any meaningful legislative history but was evidently intended to assure post-effective comment on temporary regulations, to assure that the comments would be considered within a reasonable period, and to assure that the regulations would have a limited shelf life before expiring or being promulgated as final regulations.[64]

---

[58] Public participation in the adoption of the final rule might be "unnecessary" if there were no significant comments on the interim-final rule and the rule is being made final without significant modification.

[59] *See* Davis & Pierce §7.3; Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994) (interim rule contains important change not mentioned in proposed rule—rule invalid); Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1237-38 (D.C. Cir. 1994) (provision in final rule was logical outgrowth of provision in interim-final rule so commentators had adequate notice); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979), *cert. den.* 441 U.S. 1096 (1980) (final rule invalid because interim-final rule failed to give adequate notice to commenters). In *BASF*, Justice Rehnquist would have granted certiorari to give the Court an opportunity to consider the problem of divergences between final and interim-final rules. 441 U.S. at 1097.

[60] *Cf.* American Federation of Government Employees v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981), which ruled that an interim-final rule was valid because of exigent circumstances, but ordered a more adequate notice and comment procedure before a final rule could be put in place.

[61] 1 Davis & Pierce, note 13 at 312. *See, e.g.*, Motor Vehicle Mfg. Ass'n v. State Farm Mutual Automobile Ins., Co., 463 U.S. 29, 41-44 (1983) (normal arbitrary-capricious standard applies to revocation or modification of prior rule).

[62] As another example, under the Endangered Species Act, in an emergency a species can be placed on the endangered list without prior notice and comment. However, post-adoption rulemaking procedure must be completed within 240 days or the regulation is deemed repealed. 16 USC §1533(b)(7).

IV. Anecdotal Criticism of Interim-final Regulations

Clearly interim-final rules are superior to final rules adopted without any structured opportunity for public comment. Nevertheless, many in the private sector have criticized particular interim-final rules as poorly considered, upsetting to legitimate reliance interests, and not really compelled by exigent circumstances. In their view, these rules would have been considerably better if adopted under the normal proposed rule methodology. This section summarizes some of this anecdotal evidence.[65]

A. INS Employer Sanctions

An article[66] criticized the Immigration and Naturalization Service interim regulations on employer sanctions for hiring undocumented aliens. The rules entailed major departures from prior practice, applied to a broad class of employers, imposed significant sanctions, and were contrary to advice given from INS field offices. The author of the article believed that no exigent circumstances required such precipitous action, given that the governing statute had been in effect for three years. It criticized numerous substantive and stylistic provisions in the regulations and contended that most of them would have been corrected by public input had customary notice and comment provisions been employed.

---

[63] This did not change Treasury practice; Treasury has always called for post-adoption comment on its temporary regulations.

[64] Asimow, Temporary Tax Regulations, note 8 at 361-64 This was a compromise provision; it grew out of unsuccessful efforts to narrow or repeal the interpretive rule exception as applied to tax regulations and also to improve the Treasury's compliance with the Regulatory Flexibility Act.

Temporary tax regulations adopted before the enactment of section 7805(e)(2) have languished many years in the interim limbo. Management does not want to allocate precious staff time to making them final in light of the comments already received and administrative experience. One important example is a set of temporary regulations relating to divorce tax which were adopted in 1985 and have never been finalized, despite numerous criticisms and suggestions. Treas. Reg. §§1.71-1T, 1.1041-1T. *See* Michael Asimow, *The Assault on Tax-Free Divorce: Carryover Basis and Assignment of Income*, 44 TAX L. REV. 65, 84-112 (1988).

[65] *See* Jordan, note 17 at 128-29, 160-63 (examples of rules adopted under good cause exemption that would have been improved by prior notice and comment).

[66] Paul Wickham Schmidt, "INS Employer Sanctions Interim Regulations," 67 Interpreter Releases 1057 (Sept. 24, 1990).

B. The Passive Loss Regulations

In 1986, Congress enacted a new anti-tax avoidance provision limiting deductions from passive activities.[67] The passive loss provisions targeted taxpayers who did not "materially participate" in an "activity." Such persons could not offset losses from the activity against their income from other sources. The statute was highly complex, full of vague terms, and applicable potentially to millions of taxpayers. Regulatory guidance was imperative and in 1988 and 1989 Treasury adopted two massive and detailed sets of temporary regulations to implement the statute.[68] In Treasury parlance, temporary regulations are equivalent to the interim-final rules discussed in this paper. In another article, I have questioned whether these regulations met the test for dispensing with pre-adoption procedure under the good cause exception of the APA.[69]

The passive loss temporary regulations were subjected to withering criticism by commentators, who described them as virtually impenetrable.[70] Although some of the temporary passive loss regulations remain in effect, a large portion of them were supplanted in 1994 by a much simpler, more user-friendly approach.[71] Perhaps if the passive loss regulations had been first adopted as proposed, rather than final rules, public input might have helped Treasury avoid subjecting tax professionals and the general public to five-years' worth of unworkably complex provisions.

C. Informed Consent

In 1978, The Department of Health, Education and Welfare adopted an interim-final regulation[72] requiring that participants in federally funded biomedical and behavioral research projects be advised as to the availability or nonavailability of medical treatment for physical injuries incurred as a direct result of such participation.

---

[67] Int. Rev. Code §469.

[68] T. D. 8175, 1988-1 C.B. 191, 241; T. D. 8253, 1989-1 C.B. 121.

[69] Asimow, Temporary Tax Regulations, note 8 at 346-50.

[70] *See, e.g.*, Richard M. Lipton, *What We Know, What We Don't Know, and What Went Wrong*, 67 TAXES 715, 734 (1989).

[71] T. D. 8565, 1994-2 C.B. — (Oct. 3, 1994).

[72] 43 Fed. Reg. 51559 (Nov. 3, 1978).

Johns Hopkins University severely criticized this rule because it was adopted without prior notice and comment yet without any showing of an exigency requiring immediate action.[73] In addition, the comment pointed out numerous substantive problems with the regulation, such as undefined terms and overbreadth. It asserted that these problems could have been avoided if research institutions subject to the rule had an opportunity to participate in its drafting through normal rulemaking procedures.

V. Recommendations

A. Making Post-Adoption Comment Mandatory

Version [1] Congress should require agencies that adopt rules without pre-adoption notice and comment procedure, in reliance on the good cause exception, to adopt the rules in interim-final form.

Version [2] Each agency should adopt procedural regulations requiring the agency, when it adopts rules without pre-adoption notice and comment procedure, in reliance on the good cause exception, to adopt the rules in interim-final form.

Version [3] The President by executive order should require agencies that adopt rules without pre-adoption notice and comment procedure, in reliance on the good cause exception, to adopt the rules in interim-final form.[74]

This recommendation applies only to rules adopted under the "impracticable" or "contrary to the public interest" prongs of the good cause exemption, not the "unnecessary" prong. It does not apply to merely "temporary" rules, meaning those that expire by their own terms within a reasonably short period.

Discussion: This recommendation builds upon prior ACUS action relating to the good cause exception. Recommendation 83-2[75] calls upon agencies to invite post-adoption comment on rules adopted without prior notice and comment under the good cause exception. This recommendation would make that procedure obligatory. I leave it to the Committee, however, whether this recommendation should be in the form of a statute (Version 1),[76] in the form of agency procedural regulations (Version 2), or in the form of an executive order (Version 3)—or all of the above.

---

[73] Letter from Estelle A. Fishbein to Dr. Robert Backus, NIH, January 17, 1979 and to Robert Anthony, Chair, ACUS, January 18, 1979; Letter from Jeffrey Lubbers to Estelle A. Fishbein, January 26, 1979.

[74] This article does not consider whether the President could impose this constraint on independent agencies. However, I assume that nothing prevents the President from imposing this purely procedural restriction on any agency.

[75] *See* note 7.

[76] Note that §2 of S. 343, 104th Cong., 1st Sess., contains a provision which goes beyond this recommendation. Under this proposed legislation, §553(b)(2)(A) allows adoption of a rule without pre-adoption procedure if that procedure is "contrary to an important public interest or is unnecessary due to

Rules adopted under the "impracticable" and "public interest" prongs of section 553(b)(B) tend to be quite important, both to the agency and to regulated parties. Some sort of emergency required that they be put in place without customary public participation. The presence of an emergency suggests that the agency has identified a serious problem that calls for immediate rectification. As a result, it is likely that members of the public will be seriously impacted and will seek to provide input on the rule.[77]

For this reason, agencies should not be allowed to dispense completely with public comment, just because exigent circumstances required the agency to adopt a rule immediately. The logic of notice and comment[78]—that it produces better rules and it legitimizes the process—applies just as strongly to emergency rules as to rules where a more leisurely process is possible.[79]

Of course, anyone has the right to petition for the issuance, amendment, or repeal of a rule.[80] Therefore, in a sense, no rule is ever final; someone can always petition to change or repeal it. However, the structured opportunity to comment on an interim-final rule is superior by orders of magnitude to the ability to petition. Under interim-final methodology, the agency warrants that the process of public participation is continuing and that the rule is not yet set in concrete. All interested persons are invited to comment by a fixed date and the agency implicitly agrees to consider those comments as part of the process of finalizing the rule. No such assurances exist with respect to petitions which are often given perfunctory treatment by agencies. Therefore, the right to petition is no substitute for a mandatory post-adoption comment period.

---

the insignificant impact of the rule." The agency must publish the rule in the Register with such finding and a succinct explanation of the reasons therefor. §553(b)(2)(B).

The agency is required to comply with pre-adoption procedure "to the maximum extent feasible prior to the promulgation of the final rule" and it must "fully comply with such provisions as soon as reasonably practicable after the promulgation of the rule." *Id.* The same requirement was contained in S. 1080, 97th Cong. 2d Sec. §553(b)(2)(C); the Senate adopted this bill unanimously in 1982, but it failed in the House. For discussion, *see* Jordan, note 17 at 168-76.

I oppose this provision. It should not apply to rules adopted under the "unnecessary" prong. More important, the test is certain to provoke litigation on the highly indeterminate tests of whether an agency provided pre-adoption procedure "to the maximum extent feasible" and whether it completed post-adoption procedure "as soon as reasonably practicable." The last thing we need is more opportunities to raise doubt about the procedural validity of rules or to compel courts to apply vague, contextual, standardless provisions to complex agency rulemaking chronologies.

[77] To prevent interested persons from overlooking the interim-final rule, an agency should publish it in the final rule section of the Federal Register and should also cross-reference it in the proposed rule section of the Register.

[78] *See* text at notes 13-14.

[79] *See* ICC v. Oregon Pacific Industries, Inc., 420 U.S. 184, 193 (1975) (Powell, J. concurring) (public comment should be invited once the emergency abates).

[80] APA §553(e).

Currently pending regulatory reform legislation will, if enacted, increase the costs to agencies of making many rules. The legislation requires agencies to articulate their risk assessments and to perform detailed cost-benefit analyses. In some situations, these additional burdens may tip the balance in favor of dispensing with pre-adoption procedures if an agency has a plausible claim of exigent circumstances. However, agencies should not be able to escape the burdens of rulemaking—either familiar notice and comment procedure or newly added analytical requirements—by reliance on the good cause exception. Agencies should be required to perform the necessary analyses after an emergency rule is adopted.

The Federal Register study discussed previously[81] shows that the majority of rules adopted under the good cause exception are interim-final rules. For example, in April, 1994, there were 27 interim-final rules and only five rules adopted under the good cause exemption for which post-adoption comment was not solicited.[82] Therefore, the existing practice suggests that making post-adoption comment mandatory would not radically change the practice or unduly strain agency resources.

This writer normally favors lightening, not increasing, the burdens of regulatory procedure on agencies.[83] However, this recommendation is an exception: I do not believe that the requirement of obligatory post-adoption comment on rules adopted under the good cause exemption is an onerous one (since it is generally being complied with now), yet the basic logic of notice and comment rulemaking requires it.

Certainly, it is possible that this recommendation might cause an agency to use informal emergency adjudication rather than emergency rulemaking to deal with a particular crisis. At the margin, the cost of going through post-promulgation notice and comment procedure could tip an agency in the direction of adjudication, on the theory that fewer costly procedures are required in a true emergency adjudication. That an agency might substitute adjudication for rulemaking is always a risk with any sort of mandated rulemaking procedure. However, the risk is relatively slight in this situation, since in most cases generalized rulemaking is needed to deal with the problem. Piecemeal adjudication will not adequately address the problem the agency confronts. Moreover, even emergency adjudication has costs; normally, an agency that acts before it provides appropriate procedure still has to provide the procedures after it acts. Therefore, potential substitution of adjudication for rulemaking does not seem like a serious problem.

---

[81] *See* text at notes 24-29.

[82] This figure excludes rules adopted under the "unnecessary" prong of good cause and excludes purely temporary rules. In the third quarter of 1991, there were 90 interim final rules and 46 rules adopted under good cause without inviting post-adoption comments.

[83] *See, e.g.*, Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127 (1994); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L. J. 381.

In some states, the APA provides for the adoption of emergency rules, but it also requires post-promulgation notice and comment.[84] This is true of some federal statutes also.[85] The logic of these provisions is clear and compelling: agencies should not be able to use the presence of an emergency as the basis for dispensing with inconvenient rules requiring public comment in the rulemaking process.

B. Shelf-life of Interim-final Rules

[Version 1] Interim-final rules adopted under the "impracticable" or "contrary to public interest" portions of the good cause exception, and which by their terms have an indefinite life, should expire after three years unless adopted as final rules within that time.

[Version 2] Interim-final rules adopted under the "impracticable" or "contrary to public interest" portions of the good cause exception, and which by their terms have an indefinite life, should contain a date at which the rule will be considered final. On that date, the rule will no longer be an interim-final rule, even though the change in status will not be published in the Federal Register. If an agency receives comments on an interim-final rule, or if it wishes to modify the rule with or without having received comments, it should adopt the rule as final by publishing it in the Federal Register together with appropriate response to any comments received.

Discussion: One problem with interim-final rules is that it is easy to put them aside once they are adopted. The rule is already in effect. Members of the public subject to the rule are complying with it. Busy members of the agency staff feel no urgency in dealing with the comments received (if any) or in figuring out how to modify the rule in light of the comments or administrative experience or in doing the paperwork to make the rule final.[86] Strong management is necessary to induce staff members to complete the work on interim-final rules.[87] If rules dangle indefinitely in the interim limbo, the comments submitted by the public will have no effect. Desirable modifications in the rule will not occur. And the public will be less likely to submit comments on future interim-final rules, since it appears they fall into a black hole.

---

[84] Wisconsin and California are two states with such provisions. These statutes allow an emergency rule to remain in effect only for a brief period (120 days). *See* Comment, *The Wisconsin Emergency Rule Provision: Increased Use in Response to a Slow Rulemaking Process*, 1978 WIS. L. REV. 485; Calif. Gov't Code §11346.1(b); 1 Gregory Ogden, CALIFORNIA PUBLIC AGENCY PRACTICE §21.05, 21.06[4] (1988 and current Supp.).

The 1981 Model State APA, §3-108(c), allows the governor or the legislative rules committee to trigger post-adoption notice and comment procedure with respect to a rule adopted under the good cause exception. If the trigger occurs, the rule lapses unless the agency completes notice and comment procedure and readopts it within 180 days. Arthur Bonfield, the draftsman of the 1981 Model Act, defends this provision but he also states that there are good arguments for the approach taken in the recommendation—mandatory post-effective notice and comment for rules adopted under the "impracticable" and "contrary to the public interest" prongs of good cause. State Administrative Rulemaking §6.8.9 (1986).

[85] *See* note 23.

The Federal Register study of interim-final rules[88] adopted in the first quarter of 1989, and in the third quarter of 1991, indicated that many of those rules remained as interim rules three years after they were adopted. In the case of the 1989 rules, 46% remained unfinalized by 1992; in the case of the 1991 rules, 42% remained unfinalized by 1994.

As previously discussed,[89] section 7805(e)(2) of the Internal Revenue Code imposes a three-year shelf life on tax regulations. An interim-final tax regulation expires in three years unless it is made final within that period. This provision appears to have worked well and to have caused no serious problems for Treasury.[90]

Version 1 of Recommendation B imposes a mandatory shelf-life provision like that contained in section 7805(e)(2). It would compel agencies to give priority to considering the input received on interim-final rules and put them into final form.[91] If an agency failed to complete work on the rule within three years,

---

[86] *See* Kinney, note 40 at 884, 992 (agency administering Medicaid program uses interim-final rules, invites comments, but fails to make them final).

[87] Neil Eisner, of the Department of Transportation, says that he tracks every rule and rides herd on the staff to finalize the interim-final rules.

[88] *See* text at notes 24-29.

[89] *See* text at notes 63-65.

[90] An IRS official who requested that his name not be used stated that he was not aware of any serious problems caused by section 7805(e)(2). In a couple of instances in 1991-92, the agency experienced some time pressures in completing action within the three-year period. As a general practice, IRS and Treasury try to make both proposed and temporary (the IRS' term for interim-final) regulations final within one to two years.

However, section 7805(e)(2) would be far more problematic if Treasury were making extensive use of temporary regulations. It now utilizes temporary regulations much less than it did around the time of the 1986 Tax Reform Act which deluged the agency with rulemaking projects. *See* Asimow, Temporary Tax Regulations, note 8 at 347 n.23. The IRS official stated that agency policy now was to use the proposed regulation process in all cases unless a real emergency required the use of interim-final regulations.

[91] *See* Jordan, *supra* note 17 at 168-74, discussing legislation proposed in 1982 and 1983 that would have imposed a 120-day time limit on "emergency" regulations adopted without prior notice and comment proceedings under the good cause exception. I believe that 120 days is far too short a period. California's experience under a similar provision strengthens my conviction. *See* note 85. Agencies are entitled to establish priorities and should not be required to set aside other matters in every case to finalize an emergency regulation. And for complex rules or ones that attract many public comments, 120 days just isn't enough.

Similarly, I oppose the provision adopted by the Senate in 1982, and contained in S. 343 of the current Congress that would require completion of post-adoption procedure "as soon as reasonably practicable." *See* note 77. This vague term is an invitation to litigation; moreover, it is not clear that an the rule would lapse. It could not again be adopted as an interim-final rule without a showing of the necessary exigent circumstances.

One criticism of Version 1 is that it could disrupt agency activity. The shelf-life provision will compel agencies to allocate scarce resources to rule revision as the three-year date nears, thus interfering with other uses of the staff that the agency may regard as having higher priority. Alternatively, if staff cannot be spared to attend to finalizing the rule, the rule may lapse with disruptive effect on the agency's regulatory program. Or the shelf-life provision may result in a hasty decision to make a rule final without any changes, even though the agency has received public comments or has had actual practical experience with the rule that should have induced it to consider modifications.[92] Similarly, the shelf-life provision would be disruptive in situations in which the agency still has not figured out what to do with an interim-final rule three years after it is adopted.[93]

Another bad effect is that Version 1 may require unnecessary busywork in some cases. Suppose an agency adopts a large number of emergency rules with respect to which it expects no comments and almost never receives any.[94] In such circumstances, the publication of a notice in the Federal Register that the rule is now final costs money and serves no useful purpose. Moreover, once in a while agency staff will overlook the need to publish the finality notice; in that case the rule would inadvertently lapse, with serious effects on the regulatory program.

Version 2 of Recommendation B permits the agency to insert a date in an interim-final rule; if no comments are received and the agency has no need to modify the rule, the rule is deemed final as of that date. This solves the problem of unnecessary busywork or inadvertent lapse discussed in the preceding paragraph.[95] Version 2 does not, however, solve the problem that a shelf-life

---

agency should be required to prioritize the task of finalizing interim-final rules regardless of other demands on staff time.

[92] A failure to consider public comments, or to explain why the comments were disregarded, could render the rule vulnerable to attack on judicial review. *See* text at notes 58-62.

[93] One member of the ACUS Rulemaking Committee pointed out an NRC interim-final rule on ductility of reactor vessels adopted years ago by the NRC and never finalized. The agency has still not decided how to solve the underlying technical problem and regards the rule as a stopgap. It does not wish to make it final at this time.

[94] Airworthiness Directives published by the FAA are an example. These mandate emergency safety procedures such as inspections for corrosion on particular aircraft. FAA publishes a large number of these and virtually never receives any comments, since the directives are informally cleared with users and manufacturers before being published. The Directives are sometimes superseded by new ones that mandate different procedures and are also adopted under the good cause exemption. Similarly, FAA adopts Airspace Directives that relocate cities within air traffic control regions. These are also adopted under the good cause exception. No comments are ever received. Interview with Karen Petronis, FAA Staff Attorney, April 3, 1995.

[95] The Version 2 approach resembles "direct final rules," discussed in note 10. These are non-controversial rules adopted under the unnecessary prong of the good cause exemption which become final

provision (or a built-in final date) can disrupt agency activity when comments have been received and the rule cannot become final without further agency action.[96]

On balance, I think agencies should be required to make their interim-final rules final within a reasonable period. Therefore, I favor Version 2 of Recommendation B. Under that approach, interim-final rules would become final at the time a built-in finality date arrives unless the agency has published an earlier Federal Register notice finalizing the rule or modifying it in light of comments received or its actual experience under the rule.

C. Statutory Provision for Interim-final Regulations

In statutes containing implementation deadlines, Congress should consider whether to provide explicitly that agencies can implement the statute by using interim-final rules.

Discussion: Agencies have frequently relied on the good cause exemptions in cases in which a new statute required an agency to adopt implementing rules under time constraints. Some cases have allowed the agencies to dispense with notice and comment in this situation. Other courts have invalidated rules, deciding that the agency could have complied with the APA if it had engaged in a full-court press.[97] Therefore, reliance on the good cause exception to adopt rules under a statute that imposes tight implementation deadlines is a somewhat risky course of action.

Congress should anticipate this problem by explicitly providing authority for the agency to use interim-final rules in situations where the agency must provide regulatory guidance quickly. Just such a provision was contained in President Clinton's health care legislation and in other recent statutes.[98] Such provisions allow an agency to get its rules out quickly so that a new statute can be implemented on time.

The advantage of such a provision is that an agency need not worry about whether a court will agree that the agency confronted an emergency sufficient to dispense with pre-adoption public participation. An agency will not feel compelled to go through a truncated notice and comment proposed rule procedure that will be so rushed that it will satisfy nobody. Instead, the interim-final

---

if nobody seeks to submit adverse comment. If anybody indicates intention to submit such comments, the agency switches into the proposed rule mode. Thus the agency avoids unnecessary comment procedure while receiving assurance that public participation truly was unnecessary.

[96] If a rule became final without any changes because of a built-in finality date, but the agency had received comments on the rule, a court might well set the final rule aside because the agency had failed to respond to comments after inviting them. *See* text at notes 58-62.

[97] *See* note 40.

[98] *See* note 23.

approach assures that the public will be invited to submit comments within a reasonable time frame and the agency will be required to take account of those comments, as well as its actual experience under the rule, when it adopts a final rule.

In this situation, Congress should impose a shelf-life requirement on interim-final rules. Unless the rules are made final within the designated period, they will lapse, thus compelling the agency to start over with pre-adoption notice and comment.[99] Here the rules are so important and likely to be so controversial that the agency should not be permitted to allow them to dangle in interim limbo indefinitely.

Where Congress authorizes interim-final rules to speed implementation of a new statute, it should also provide that the rules will not be effective until thirty days after they are adopted. In this situation, the normal thirty-day pre-effectiveness period of section 553(d) seems especially important, since the rules may come as a surprise to regulated parties.[100] However, the generic good-cause exemption of section 553(d) will remain in effect, so that an agency might shorten or eliminate the 30-day period if it can make a sufficiently persuasive case for doing so.

D. Permanent Rules That Supplant Interim-final Rules

Version [1] Congress should provide by statute that a rule is not vulnerable to challenge simply because it supplants an interim-final rule that was adopted without good cause for dispensing with pre-adoption notice and comment procedure.

Version [2] Courts should not set aside a rule simply because it supplants an interim-final rule that was adopted without good cause for dispensing with pre-adoption notice and comment procedure. Instead, this should be treated as harmless error.

Discussion: Final rules that supplant interim-final rules are vulnerable to challenge on the grounds that the interim-final rule was not warranted by the good cause exemption.[101] Courts that have overturned final rules on this ground reason that some commentators might have been discouraged from commenting on the interim-final rule because it was already in effect. Similarly, it is argued, agencies are less willing to consider comments on interim-final rules than on proposed rules.[102] Thus the notice-and-comment process that precedes adoption of a final rule that supplants an interim-final rule is suspect. In some cases, courts have invalidated permanent rules on this basis. Many other rules are vulnerable to this sort of attack.

---

[99] Congress provided a four-month shelf life provision with respect to the interim-final rule provision of the Social Security Amendments of 1983. *See* note 23. It allows 240 days in the case of emergency rules under the Endangered Species Act. *See* note 63.

[100] The interim-final rules provided for by the 1983 Social Security Amendments embodied a 30-day pre-effectiveness period. *See* note 23.

[101] *See* text at notes 55-58.

I believe that invalidation of a final rule because it was preceded by an interim-final rule rather than a proposed rule is a bad result. Judicial invalidation of a rule threatens agency enforcement programs and disappoints private reliance interests. It is a costly and destabilizing event. The fact that the comments on the rule came in response to an interim-final rule rather than a proposed rule is not a sufficient basis to invalidate the final rule, simply because hindsight shows that the interim-final rule was not properly justified by exigent circumstances.

I have proposed two versions of Recommendation D. One approach is to recommend that Congress provide by statute that a final rule that supplants an interim-final rule should not be invalidated simply because the agency lacked good cause to adopt the interim-final rule.[103] Alternatively, the Conference could recommend that the federal courts not set aside a rule under these circumstances; receiving comment under an invalidly adopted interim-final rule, rather than under a proposed rule, could be considered harmless error.

Of course, under either version, a final rule could be invalidated for the same reasons that a court might invalidate any final rule: for example, that the interim-final rule was so different from the final rule that the public was not adequately notified,[104] or that the agency failed adequately to consider the comments it received in response to the interim-final rule.[105]

This recommendation would not apply if an interim-final rule is challenged before it is made final. In that case, the rule could be judicially invalidated on the basis that it was adopted without the requisite good cause for dispensing with pre-adoption procedure. Thus, for example, sanctions arising under the interim-final version of the regulation would be set aside, but sanctions under the final rule would be upheld. And an advantage of this approach is that it would give agencies a powerful incentive to get their interim-final rules into final form—the same objective pursued in Recommendation B, discussed above.

---

[102] There is plenty of judicial authority for these propositions. *See* notes 33, 56. However, my interviewing indicates little agreement with them. Most people I have asked think there is no difference between the quality and quantity of comments on proposed rules as opposed to interim-final rules. There is some weak empirical support for the proposition that agencies are less willing to modify interim-final rules in response to comments than they are to modify proposed rules. *See* text at notes 30-32.

[103] *See* Asimow, Temporary Tax Regulations, note 8 at 372-73 (proposal for an amnesty provision protecting permanent tax regulations that supplant temporary tax regulations).

[104] *See* note 60.

[105] *See* note 62.

VI. Conclusion

Interim-final rules have become an extremely common and useful regulatory device: they allow regulators to put a regulatory structure in place quickly in the case of an emergency yet also obtain many of the benefits of public participation in rulemaking. Indeed, Congress should recognize the utility of interim-final rules by specifically providing for their use when it adopts statutes containing implementation deadlines.

It is time to take the next logical step: mandating post-adoption comment procedures in the case of rules adopted in an emergency. Moreover, some statutory or regulatory guidelines should assure that interim-final rules not languish forever without being finalized. However, such shelf-life provisions should be drafted with care to avoid creating counter-productive pressures on agencies to set aside other tasks in order to finalize interim rules. Finally, both courts and Congress should recognize that there is no utility in setting aside final rules adopted to supplant interim-final rules that, in hindsight, are found not to fit within the APA's good cause exemption.

Report for Recommendation 95-5

The Choice of Forum in Bid Protest Disputes

William E. Kovacic
Visiting Professor of Law
Washington College of Law
American University

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

INTRODUCTION 511

I. DESCRIPTION AND COMPARISON OF EXISTING PROTEST FORUMS 514
  A. Private and Public Contracting Compared 514
  B. The Evolution of the Bid Protest Mechanism 516
  C. Protest Forums Compared 520
    1. Subject Matter Jurisdiction 521
    2. Standing Requirements 522
    3. Standard and Scope of Review 522
    4. Procedural Features 524
    5. Remedies 525
    6. Settlements 527
    7. Appeals 527
    8. Substantive Competence of the Protest Tribunals 528
  C. Trends in Use and Performance Over Time 528

II. THIRD PARTY MONITORING 530
  A. Rationales for Robust Third Party Monitoring 530
  B. Disadvantages of Expansive Third-Party Monitoring 532
  C. Summary of the Policy Debate 534

III. OPTIMAL FORUM MIX 535
  A. Recent Reform Proposals 535
    1. Section 800 Committee 535
    2. Legislative Measures 535
  B. Multiplicity and Public Administration: Overview 535
  C. Rationales for Multiple Protest Forums 536
  D. Costs of Multiplicity in Protest Forums 541
  E. Synthesis 543
    1. The Consolidation of Judicial Protest Forums 543
    2. Consolidation of Administrative Forums 546
    3. The Underlying Policy Issue: Assessing the Value of Protest Oversight 547

IV. SUMMARY OF RECOMMENDATIONS 549

REFERENCES 551

Introduction

To an observer unfamiliar with dispute resolution in the United States, a reading of the U.S. Code and the Code of Federal Regulations might suggest that the adjudication of complaints by disappointed seekers of government contracts is the preeminent concern of American economic regulation. This perception would reasonably flow from the elaborateness and multiplicity of devices for redress made available to disgruntled offerors. In addition to permitting review within the purchasing agency itself, the "bid protest" system provides four forums in which offerors can contest procurement decisions of federal agencies.[1] No other regime of federal economic regulation provides so large and diverse an array of avenues for challenging the decisions of government officials.

The complexity of the federal bid protest mechanism has inspired periodic calls to simplify the structure of the protest process and to adjust its substantive focus.[2] For a variety of reasons, this is an appropriate time to reexamine bid protests. Purchasing agency officials and vendors have had over a decade's experience with the Competition in Contracting Act (CICA)[3] which, more than any other statute, regulation, or judicial decision, laid the foundation for the existing bid protest system.[4] CICA created a strong presumption that government purchasing agencies should use competitive procurement techniques that erred on the side of increasing opportunities for firms to compete for contract awards.[5] Among other means for achieving its competition goals, CICA bolstered the bid protest mechanism and increased the ability of complaining offerors to gain access to information (through document requests and depositions of key procurement personnel) about government procurement decisionmaking.[6]

---

[1] As described in Section I below, these forums do not have identical subject matter jurisdiction. The number of protest paths available to an offeror depends on the type of goods or services being purchased.

[2] *See, e.g.*, John W. Whelan, *Understanding Federal Government Contracts* 82 (1993):

> [F]ederal remedies for bid protesters are complex, sub limine politicized (one suspects strongly) and excruciatingly difficult to understand as a system except for a long-experienced or extraordinarily patient government contracts lawyer. It is in the interest of citizens, contractors, and lawyers alike that these remedies be simplified and made more expeditious.

[3] Pub. L. No. 98-369, 98 Stat. 1175-1203 (1984) (codified in various sections of Titles 10, 31, 40, and 41 of the U.S. Code).

[4] *See* George M. Coburn, *The New Bid Protest Remedies Created by the Competition in Contracting Act of 1984*, 19 NAT. CONT. MGT. J. 47 (1985).

[5] *See* 10 USC §2304(a)(1)(A) (requiring purchasing agencies to "obtain full and open competition through the use of competitive procedures"); 10 USC §2305(a)(1)(B)(ii) (specifications in government solicitations should "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency"); *see also* William B. Burnett & William E. Kovacic, *Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual-Sourcing*, 6 YALE J. ON REG. 249 (1989) (studying CICA and other competition-oriented procurement reforms of the 1980s).

A second reason for reassessment is a recent outpouring of commentary dealing with bid protests. Recent years have featured the emergence of a new body of economically-oriented academic scholarship dealing with the protest process and the incentives that guide public purchasing officials in buying goods and services for government agencies.[7] Bid protests also have been the subject of extensive studies by professional associations[8] and blue ribbon commissions, including the Acquisition Law Advisory Panel (the "Section 800 Committee").[9] In addition, the National Performance Review's study of government committed the Clinton Administration to achieving broad procurement reforms that, among other effects, would give public purchasing officials more discretion and increase their ability to defeat challenges by disappointed offerors.[10]

A third significant circumstance is that Congress has recently given extensive consideration to procurement reform. Severe budget pressures have inspired several congressional committees to consider legislation that would cut procurement transaction costs and induce more firms to compete for government contracts. The most important legislative reform is the Federal Acquisition Streamlining Act of 1994 (FASA),[11] which changed many aspects of procurement regulation, but left the essential architecture of the protest mechanism undisturbed.[12] The Act did not alter the existing framework of protest dispute resolution venues, nor did it change the standards applied by protest tribunals.[13]

---

[6] *See, e.g.*, 31 USC §§3551-3556 (codifying expanded bid protest powers of the GAO).

[7] *See* Luis Cabral & Shane M. Greenstein, *Switching Costs and Bidding Parity in Government Procurement of Computer Systems*, 6 J.L. ECON. & ORG. 453 (1990); Shane M. Greenstein, *Procedural Rules and Procurement Regulations: Complexity Creates Tradeoffs*, 9 J.L. ECON. & ORG. 159 (1993); Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (1990); Jean-Jacques Laffont & Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (1993); Robert Marshall, Michael J. Meurer & Jean-Francois Richard, *Incentive-Based Procurement Oversight by Protest*, in INCENTIVES IN PROCUREMENT CONTRACTING 39 (Jim Leitzel & Jean Tirole, eds. 1993); Robert Marshall, Michael J. Meurer & Jean-Francois Richard, *Curbing Agency Problems in the Procurement Process by Protest Oversight*, 25 RAND J. ECON. 297 (1994); Robert Marshall, Michael J. Meurer & Jean-Francois Richard, *Litigation Settlement and Collusion*, 109 Q.J. ECON. 213 (1994); Robert Marshall, Michael J. Meurer & Jean-Francois Richard, *Multiple Litigants with a Public Good Remedy*, 16 RESOL. IN L. & ECON. 151 (1994); Robert Marshall, Michael J. Meurer & Jean-Francois Richard, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 HOFSTRA L. REV. 1 (1991); *see also* William P. Rogerson, *Economic Incentives and the Defense Procurement Process*, 8 J. ECON. PERSP. 65 (1994) (surveying recent economic literature on procurement issues).

[8] *See* American Bar Association, Section of Public Contract Law, *The Protest Experience Under the Competition in Contracting Act* (1989).

[9] *See* Acquisition Law Advisory Panel, *Streamlining Defense Acquisition Laws* 1-203 to 1-283 (1993) (hereinafter "Section 800 Committee").

[10] *See* National Performance Review, Creating a Government That Works Better & Costs Less 26-31 (1993).

[11] Pub. L. 103-355. For a thorough analysis of the 1994 Streamlining Act, see Rand L. Allen & James L. Gildea, *Complying with FASA: A Comprehensive Guide to the Federal Acquisition Streamlining Act* (1995).

The adoption of FASA signals a new congressional receptivity to proposals for restructuring the procurement process. Given the importance, and controversial role, of bid protests in government contracting, Congress and Executive Branch agencies are likely to revisit the protest question in the coming years.[14] The protest dispute resolution mechanism promises to figure prominently in efforts by these and other bodies to retool the procurement system. Indeed, in February 1995, the Clinton Administration proposed fundamental adjustments in the structure and operation of the protest system.[15] In general, the Administration's proposals would retrench the protest system by narrowing the number of protest forums and curbing the ability of offerors to challenge procurement decisions involving computer and telecommunications equipment.[16]

This paper examines the existing system of bid protest forums and considers approaches for improving the protest mechanism. It treats these topics in four parts. Part I describes the existing protest apparatus. Part II discusses the rationales for relying on an expansive system of third-party monitoring and reviews criticism of this approach. Part III summarizes recent advisory commission and legislative reform proposals and considers the optimal mix of protest forums. This part also addresses policy issues concerning the wisdom of relying on a robust protest mechanism as an oversight device in public contracting. Part IV presents recommendations for reform.

---

[12] *See* Ralph C. Nash, Jr. & John Cibinic, Jr., "Dateline December 1994," 8 *Nash & Cibinic Rep.* 177 (Dec. 1994) (in enacting FASA, "Congress never gave meaningful consideration…to any real reform for the resolution of award controversies. All it did was hang a few new gadgets on the clumsy old flivver."). FASA contains some provisions relevant to the protest system. For example, FASA mandates that government agencies promptly disclose to losing offerors the basis for the selection of the winning offeror. Pub. L. 103-355, Section 1014 (to be codified at 10 USC §2305(b)(5)(A) and Section 1064 (to be codified at 41 USC §2536(e)(1). The availability of a fuller, expeditious "debriefing" may discourage protests by firms which previously had challenged contract award decisions largely to determine why the government had rejected their proposals.

[13] The Senate version of the Act (S. 1597) would have consolidated all protest jurisdiction of the federal courts in the Court of Federal Claims. This measure was dropped in conference. *See* Richard D. Lieberman, *Scorekeeping Bid Protests in Six Forums*," 63 Fed. Cont. Rep. (BNA) 1, 22 (Feb. 27, 1995) (Special Supplement).

[14] *See* William S. Cohen, "Computer Chaos: Billions Wasted Buying Federal Computer Systems" 21-24 (Oct. 12, 1994) (report by the ranking minority member of the Senate Governmental Affairs Subcommittee on Oversight of Government Management); Elana Varon, *Administration Takes Aim at Protest Process*," FED COMPUTER WK, Mar. 6, 1995, at 1 (describing plans by Rep. William Clinger, chair of the House Government Reform and Oversight Committee, to introduce legislation to change the protest system).

[15] *See* Allen & Gildea, *supra* note 11, at App. 4 (reprinting the proposed Federal Acquisition Improvement Act of 1995).

[16] *See id.* at 15-1 to 15-13.

I. Description and Comparison of Existing Protest Forums

A. Private and Public Contracting Compared

The law of private commercial contracting provides an instructive benchmark for analyzing the public contract regulatory scheme. If we assume that the legal regime for private contracts has evolved over time to increase the efficiency of private commerce (e.g., by reducing the cost of executing transactions),[17] we might ask how and why public contract law departs from the private model.

The law of private contracts has no counterpart to the public contract protest system. Under private contract law, disappointed offerors in private contracting generally have no right to attack the buyer's choice of suppliers. Private contract law provides no basis for recovery where the offeror contends that the buyer defined the specifications of a good or service improperly, refused to consider the bids of specific offerors, failed to adhere to announced selection criteria, or applied its selection criteria unevenly to individual offerors. A private firm ordinarily has a contractual cause of action to challenge these forms of behavior only if it has previously contracted with the purchaser to require the purchaser to follow desired selection procedures, and the seller can show that the purchaser violated its commitment.[18] The private contract system relies mainly on reputation to constrain the discretion of private purchasers in dealing with potential sellers.[19] A private buyer cannot afford to treat suppliers of inputs too arbitrarily or unfairly, lest sellers refuse to deal with the buyer in the future.

The public contracting process is strikingly different in its treatment of actual and potential offerors of goods and services. In addition to pursuing redress within the purchasing agency, the disappointed offeror can challenge the government's conduct in one of four protest forums: the General Accounting Office (GAO), the General Services Board of Contract Appeals (GSBCA) (for contracts involving automated data processing and telecommunications equipment), the federal district courts, and the Court of Federal Claims (CFC).[20] In no other area of public administration have Congress and the courts provided so robust and elaborate a system of decentralized oversight.

---

[17] A significant body of commentary supports this assumption. *See, e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF LAW 251-55 (4th ed. 1992).

[18] *Cf.* Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (S.Ct. Wisconsin 1965) (using promissory estoppel to impose contractual liability on franchisor that engaged in long-running negotiations with prospective franchisee); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements*, 87 COLUM. L. REV. 217, 221-43 (1987) (discussing possible applications of doctrine of promissory estoppel to establish contractual liability arising from preliminary agreements).

[19] See Douglas W. Allen & Dean Lueck, *The 'Back Forty' on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts*, 8 J.L. ECON. & ORG. 366 (1992); Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AM. BEHAVIORAL SCIENTIST 337 (1980); Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963); Robert D. Cooter, "Market Modernization of Law" (April 1995).

Commentators have offered essentially four explanations of why public procurement law gives disappointed offerors expansive protest rights. One hypothesis (discussed more fully in Part II below) is that government purchasing agents lack the same incentives as their private sector counterparts to make procurement choices that maximize the interests of their principals (i.e., taxpayers). To surpass their commercial rivals and maximize profits, private firms strive to develop monitoring and incentive schemes that press their purchasing agents to make efficient contracting choices. Some observers have concluded that no comparably effective pressure guides the purchasing decisions of public procurement authorities. Thus, protests are said to help compensate for weaknesses in incentives by giving knowledgeable third parties the ability to challenge deviations from procurement statutes and regulations.

A second hypothesis is that the protest process is a device by which the government signals to firms that it is a suitable partner with which to do business. Contracting with the government requires firms to bear risks that they generally need not assume in private commercial transactions. To be eligible to receive a government contract, firms often must make investments (e.g., creating various internal cost allocation controls) that respond to idiosyncratic government requirements and have no use in private contracting.[21] If government purchasing officials in fact have weaker incentives than private buyers to make efficient procurement choices, prospective offerors also may perceive a greater risk that purchasing decisions will be made arbitrarily. The protest system may serve to encourage firms to satisfy idiosyncratic government requirements by signaling that federal agencies will be required to select among offerors on the basis of well-specified price and quality factors. The protest system's remedies — especially the availability of bid and proposal costs and the power to compel government agencies to repeat a procurement — represent credible commitments that the government will indemnify offerors for government-specific transaction investments when public purchasing officials err.[22]

---

[20] The CFC was constituted as the United States Claims Court by the Federal Courts Improvement Act of 1982. The judges of the Claims Court were drawn from the trial division of what had been the United States Court of Claims. The 1982 Improvements Act made the judges of the Appellate Division of the Court of Claims members of the new U.S. Court of Appeals for the Federal Circuit. Under the Federal Courts Administration Act of 1992, the Claims Court was renamed the Court of Federal Claims. On the background of the original Court of Claims, see William M. Wiecek, *The Origin of the United States Court of Claims*," 20 ADMIN. L. REV. 387 (1968). On the creation of the Claims Court, see Philip R. Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7 (1983).

[21] *See* William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POL'Y SCI. 29 (1992).

A third explanation is that public procurement regulation seeks to accomplish nonefficiency goals that ordinarily are of little concern to private firms.[23] One procurement system aim is to ensure that government purchasing agencies deal "fairly" with actual and prospective suppliers. As discussed here, the fairness objective is distinct from the signaling function mentioned above. The fairness objective stems mainly from the perception that the government's power in the country's economic and social structure imposes on public purchasing agencies a higher duty in their dealings with sellers than purely private parties bear in their commercial relationships. Protests serve the fairness objective by ensuring that all vendors have access to the selection process.

A fourth explanation, also rooted in the nonefficiency goals of the procurement process, is that federal acquisition regulation should ensure that the procurement process achieves the highest possible degree of integrity.[24] Government agencies are thought to stand on a different footing because they use public funds. As the conservators of the public trust, government purchasing officials are said to be worthy candidates for more exacting scrutiny than their private purchasing counterparts. Seen in this light, protest controls are one part of a large body of regulatory safeguards that are deemed necessary to deter and punish ineptitude, sloth, or corruption of public purchasing officials.

B. The Evolution of the Bid Protest Mechanism

A second useful perspective on the bid protest process is historical. Examining the history of the bid protest apparatus illuminates important technical features of the current protest mechanism and indicates why the current system of multiple protest dispute resolution forums came into being.

The first and oldest path of redress for a disappointed offeror is to complain to the purchasing agency.[25] For over a century it has been possible for offerors to submit the decisions of contracting officials to internal review by their superiors. Although protests at the agency level sometimes result in an adjustment in procurement outcomes, the traditional concern with agency protests has been that reviewing officials will experience, and succumb to, strong institutional pressures to slight legitimate protestor objections and vindicate the decisions of the agency's contracting officials.

---

[22] *See* Lieberman, *supra* note 13, at 23. The availability of bid and proposal costs for disappointed offerors seems to serve the risk allocation function that sometimes is performed by liquidated damages clauses in private contracts. *See* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

[23] For a discussion of the procurement system's nonefficiency goals, see William E. Kovacic, *The Sorcerer's Apprentice: Public Regulation of the Weapons Acquisition Process*, in ARMS, POLITICS, AND THE ECONOMY: HISTORICAL AND CONTEMPORARY PERSPECTIVES 104 (Robert Higgs, ed. 1990).

[24] *See* S. Kelman, *supra* note 7, at 11-15.

[25] *See* W. Noel Keyes, *Government Contracts in a Nutshell* 256-57 (2d ed. 1990); *see also* Federal Acquisition Regulation 33.102(b)(1) (an "interested party wishing to protest is encouraged to seek resolution with the agency before filing a protest with GAO or GSBCA").

The framework of protest oversight external to the procuring agency began to take shape in the 1920s following the creation of the GAO with its Office of Comptroller General. Soon after the GAO was formed as part of the Budget and Accounting Act of 1921, the Comptroller General began accepting bid protests as part of GAO's authority to settle and adjust claims by and against the United States, and to issue advisory decisions to disbursing authorities, certifying officers, and heads of agencies concerning questions of payment by the government.[26] GAO's views on specific protests were recorded in Comptroller General decisions, and procurement agencies ordinarily heeded the Comptroller's recommendations, even though many commentators questioned GAO's authority to serve as a protest forum.[27]

From the early 1920s until the mid-1950s, the GAO afforded the sole venue for external protest oversight. The GAO's role was magnified by a series of rulings in which the federal courts declined to accept jurisdiction over bid protests. Punctuating this development was the Supreme Court's decision in 1940 in *Perkins v. Lukens Steel Co.*[28] In *Perkins* the Court concluded that disappointed offerors lacked standing to challenge the contract award choices of federal officials. The Court explained its ruling in a famous passage, which is quoted at length below because it provides a telling glimpse of prevailing judicial views about the appropriate scope of protest oversight:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the

---

[26] *See* Commission on Government Procurement, 4 *Report of the Commission on Government Procurement* 40-41 (1972); John Cibinic, Jr. & Ralph Nash, Jr., *Formation of Government Contracts* 1006 (2d ed. 1986); Alex D. Tomaszczuk & John E. Jensen, *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack by the Department of Justice*, 29 HARV. J. ON LEGIS. 399, 402-03 (1992).

[27] *See* John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 372-84 (1970).

[28] 310 U.S. 113 (1940).

> procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—not private litigants—can complain.[29]

Although *Perkins* rejected the view that the procurement statutes supplied a foundation for the federal district courts to hear contract award disputes, the decision did not foreclose all paths to judicial redress.[30] In 1956, the Court of Claims in *Heyer Products Co. v. United States*[31] ruled that the Tucker Act conferred standing on a disappointed offeror to seek damages where the government violated its implicit contractual duty to evaluate bids in good faith.[32] The aggrieved offeror's damage recovery was limited to the bid and proposal costs it incurred in responding to the government's solicitation of offers.

The philosophical basis for expanding federal judicial oversight of protests beyond the narrow scrutiny entertained by *Heyer* was established in the 1960s. Many commentators pointed out that the post-World War II increase in federal purchasing activity was an important manifestation of a fundamental expansion of the role of the federal government in the economy.[33] As the government's power to influence the economy and the fortunes of individual firms through its purchasing decisions grew, perceptions about the appropriate level of external oversight of procurement decisions changed. No longer was the government seen, as *Perkins* had envisioned it, as a buyer subject to doctrines no more restrictive than those governing contracts between private parties. Rather, access to the procurement process increasingly was depicted as a "right" or "entitlement" to be protected by more exacting procedural safeguards.[34] This perspective was reinforced by the view that, because the expenditure of public funds was at issue, the government should take greater precautions to ensure that taxpayer interests were protected.[35]

---

[29] *Id.* at 127. On *Perkins'* significance in public contract law, see James F. Nagle, *A History of Government Contracting* 515-16 (1992); Phillip M. Kannan, *Perkins v. Lukens Steel Company: Fifty-two and Counting*, 22 PUB. CONT. L.J. 463 (1993).

[30] *See* Jeffrey M. Villet, *Equitable Jurisdiction in Government Contract 'Bid Protest' Cases: Discerning the Bounds of Equity*, 17 PUB. CONT. L.J. 152 (1987) (discussing development of the federal courts' bid protest jurisdiction).

[31] 135 Cl. Ct. 63 (1956).

[32] *See* J. Whelan, *supra* note 2, at 73-74. The Tucker Act gives the Court of Federal Claims (the successor to the Court of Claims in *Heyer*) jurisdiction over "any claim against the United States founded ... upon any express or implied contract with the United States." 28 USC §1491(a).

[33] *See* Harold Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A J. 35 (1966); Arthur S. Miller & W. Theodore Pierson, Jr., *Observations on the Consistency of Federal Procurement Policies With Other Governmental Policies*, 29 LAW. & CONTEMP. PROBS. 277 (1964); Carl F. Stover, *The Government Contract System As A Problem in Public Policy*, 32 GEO. WASH. L. REV. 701 (1964); John W. Whelan, *Law of Public Administration: Need for Legal Study*, 53 GEO. L.J. 953 (1965); John W. Whelan & J.T. Phillips, *Government Contracts: Emphasis on Government*, 29 LAW. & CONTEMP. PROBS. 315 (1964).

Judicial recognition of these trends in responding to bid protest claims came soon afterward. In 1970, in *Scanwell Laboratories, Inc. v. Shaffer*,[36] the U.S. Court of Appeals for the District of Columbia Circuit dramatically accelerated *Heyer's* tentative extension of the judiciary's protest oversight role. *Scanwell* held that Section 10 of the Administrative Procedure Act (APA)[37] granted disappointed offerors standing to challenge a contract award on the ground that the procuring agency violated statutory or procedural requirements. The APA, which was adopted in 1946, postdated *Perkins* (1940) and supplied an important statutory foundation for the D.C. Circuit's decision. *Scanwell* also displayed a different view of the potential value of protests. The court's conception of protests departed sharply from the perspective of *Perkins*, which emphasized the potential for protests to impose "vexatious and dilatory restraints" on the functioning of the procurement system. The D.C. Circuit said that aggrieved offerors "are the people who will really have the incentive to bring suit" to force "agencies [to] follow the regulations which control government contracting" and that "[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity."[38] The remaining ingredients of the modern protest system were supplied in the 1980s through legislation specifically designed to modify the procurement process. In the Federal Courts Improvement Act of 1982 (FCIA),[39] Congress gave the Claims Court authority to grant equitable relief in pre-award bid protest suits. In the Competition in Contracting Act of 1984, Congress codified and augmented the GAO's power to resolve bid protests and established, for a three-year trial period, bid protest jurisdiction in the GSBCA for acquisitions of automatic data processing equipment (ADPE) and telecommunications equipment and services. Finally, in the Paperwork Reduction Reauthorization Act of 1986, Congress made permanent the GSBCA's bid protest jurisdiction.[40]

---

[34] *See* Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (in reviewing government agency's decision to debar contractor, observing that *Perkins* "cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts"); *cf.* Related Indus., Inc. v. United States, 2 Cl. Ct. 517, 526 (1983) (in discussing application of the federal government's regulations controlling the suspension and debarment of offerors, stating that "the due process clauses of the fifth and fourteenth amendments require that a determination by a governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of property or the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response").

[35] Notwithstanding *Perkins'* vision of the government as enjoying the same prerogatives as other buyers, some cases extending back to the late 19th century had expressed the view that the expenditure of public funds warranted stronger safeguards against misconduct by public purchasing agencies or their suppliers. *See* McMullen v. Hoffman, 174 U.S. 639, 651 (1899) ("Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids.").

[36] 424 F.2d 859 (D.C. Cir. 1970).

[37] 5 USC §702.

In the legislative records surrounding the enactment of modern bid protest reforms and in judicial opinions (such as *Scanwell*) that recognized an expanded jurisdiction for the federal courts to entertain protests, one finds little empirical basis for assessing the appropriate level of protest oversight. No legislatively or judicially mandated expansion of the protest process has been based on a systematic empirical analysis of whether government purchasing officials exercised their discretion to make inferior procurement choices more often than their private sector counterparts.

C. Protest Forums Compared

There are currently five dispute resolution forums for overseeing challenges to perceived deficiencies in the processes by which federal agencies solicit offers and award contracts: the purchasing agency, the GAO, the GSBCA, the CFC, and the federal district courts.[41] Three of these paths — protesting to the purchasing agency, the GAO, and the GSBCA — are commonly referred to as "administrative" dispute mechanisms, and the remaining two — filing a complaint with the CFC or with a district court — are called the "judicial" protest forums.[42] The discussion below summarizes differences among these forums.[43] The summary does not examine intra-agency protest methods and instead focuses on the four tribunals (GAO, GSBCA, CFC, and the district courts) that rely on adjudicatory or quasi-adjudicatory processes to resolve contract award disputes.[44]

---

[38] *Scanwell*, 424 F.2d at 864. *Scanwell* was one element of a broader judicial trend in the 1960s and early 1970s to increase the "fairness" of government behavior by requiring government agencies to satisfy more rigorous procedures before they could withhold a government-created benefit or privilege. *See* Perry v. Sindermann, 408 U.S. 593, 601-03 (1972); Board of Regents v. Roth, 408 U.S. 564, 573 (1972); *cf.* M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1305-06 & n.50 (D.C. Cir. 1971) ("The application of the rule of law to government procurement is an extension of trends established before *Scanwell* and is responsive to the increasing significance of government procurement in the economic life of our citizens.").

[39] Pub. L. No. 97-164, 96 Stat. 25, codified in various sections of 28 USC and other titles.

[40] Pub. L. Nos. 99-500, 99-591, §§821-25, 831, H.R.J. Res. 738, at 341-45, 99th Cong., 2d Sess. (1986). The decision to create a distinctive protest path (GSBCA) for procurements involving computers and telecommunications equipment reflected congressional dissatisfaction with the GAO's handling of ADPE protests. CICA's legislative history also displayed the view that the complexity of ADPE and telecommunications equipment procurement had overpowered existing protest procedures and made the government more prone to err in making acquisition choices and addressing protests. *See* H.R. Rep. No. 98-1157, 98th Cong., 2d Sess. 26 (1984); H.R. Rep. No. 98-861, 98th Cong, 2d Sess. 1430.

[41] The United States Postal Service (USPS) also has its own protest dispute resolution process. The USPS protest system is not treated in this paper.

1. Subject Matter Jurisdiction

The GAO, the CFC, and the district courts have jurisdiction over bid protest disputes without regard to the subject matter of the procurement at issue. The jurisdiction of the GSBCA is limited to automatic data processing equipment (ADPE) and telecommunications equipment.[45] Where the jurisdiction of the GSBCA overlaps with that of the other three tribunals, claimants cannot maintain a suit before both the GSBCA and another forum; a decision to sue before the GSBCA precludes the claimant from seeking relief from another forum.[46] Nor may a protester maintain a claim simultaneously in the CFC and the district court.[47] Where the claimant seeks relief before the GAO and either the CFC or the district courts, the CFC and the district courts often will allow the GAO to proceed first and conduct their own review after the GAO has issued an opinion.[48]

---

[42] The GSBCA is the only board of contract appeals with authority to issue relief involving bid protest disputes. *See* J. Whelan, *supra* note 2, at 75; Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983) (boards of contract appeals lack power to award bid and proposal costs to disappointed offerors).

[43] There is a large literature describing the characteristics of individual protest venues. Useful treatments include Section 800 Committee, *supra* note 9; American Bar Association, Section of Public Contract Law, *Report of the American Bar Association Public Contract Law Section Bid Protest Committee Courts Subcommittee Project* (1991); American Bar Association, *supra note* 8; J. Cibinic, Jr. & R. Nash, Jr., *supra* note 26, at 1005-46; Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment*, 21 PUB. CONT. L.J. 1 (1992); David M. Cohen, *Claims for Money in the Claims Court*, 40 CATH. U. L. REV. 533 (1991); Jerome S. Gabig, *A Primer on Federal Information Systems Acquisitions: First Part of a Two-Part Article*, 17 PUB. CONT. L.J. 31 (1987); Phillip M. Kannon, *Jurisdiction of District Courts in Cases Involving Government Contracts*, 21 PUB. CONT. L.J. 416 (1992); Villet, *supra* note 30; Richard J. Webber, *Bid Protests and Agency Discretion: Where and Why do the GSBCA and GAO Part Company?*, 18 PUB. CONT. L.J. 1 (1988).

[44] This is not to suggest that agency-level protest resolution mechanisms are unimportant. A number of observers have suggested that improvements in agency-level protest procedures could discourage recourse to external protest tribunals.

[45] Under the Brooks Act, the General Services Administration (GSA) alone has authority to buy computer and telecommunications equipment and services for federal agencies. Pub. L. No. 89-306, 79 Stat. 1127 (1965). The GSA may procure such equipment directly or grant procurement authority back to individual agencies. The GSA does not have responsibility for Department of Defense applications of ADPE for certain intelligence and cryptological functions. *See* 10 USC §2315; 40 USC §759(a)(3)(C); Cyberchron Corp. v. United States, 867 F.2d 1407, 1409 (Fed. Cir. 1989). An issue of current debate, treated more fully in Section III below, is whether Congress should expand the GSBCA's jurisdiction to encompass all federal procurement activities.

[46] 40 USC §759(h)(1). The GAO must dismiss any suit that is also pending with the GSBCA. 31 USC §3552.

2. Standing Requirements

Though stated in different terms, all four of the adjudicatory forums seek to extend standing to claimants alleging defects in the contract formation process. Consistent with the theory underpinning the *Heyer* decision, standing in the CFC is available to all persons claiming a breach of an implied contract that the government will consider their offers in good faith. Standing in the district courts is delimited by the APA requirement that the claimant show that it has been adversely affected or aggrieved by agency action.[49] Both the GAO and the GSBCA are available to "interested parties."[50] In practice, there has been some variation in how the GAO and the GSBCA have identified eligible protest candidates.

3. Standard and Scope of Review

Commentators have focused on two distinct screens by which protest forums have determined the claimant's entitlement to relief. The first is the *standard of review* by which the protest tribunal will evaluate the agency's decisionmaking. Each tribunal requires the claimant to prove that the purchasing agency has violated a statute or regulation or has provided no rational basis for its exercise of discretionary procurement authority.[51] However, the decisions of the CFC, GAO, and district courts tend to describe their standard of review more restrictively than does the GSBCA in its opinions, suggesting that the former three tribunals adopt a more permissive approach in reviewing agency action.[52]

---

[47] 28 USC §1500.

[48] The GAO ordinarily refuses to consider a protest that is being litigated concurrently before the CFC or a district court. *See* Meisel Rohrbau GmbH & Co. Kg — Request for Recon., B-228152.3, April 18, 1988, 88-1 CPD ¶ 371. Nor will GAO consider any matter in which a court has decided the issues on the merits. However, GAO will consider a protest and issue a decision upon the request of the CFC or a district court when a protest has been filed with one of the latter tribunals. *See* 4 CFR §21.3(m)(11) (1993). In a number of cases, the district courts have used the doctrine of primary jurisdiction to refer a protest to the GAO and have enjoined the award or performance of a contract pending receipt of the Comptroller General's views. *See* Wheelabrator Co. v. Chafee, 455 F.2d 1306, 1313-16 (D.C. Cir. 1971).

[49] 5 USC §702; *see also* 28 USC §1346(a)(2) (vesting the district courts with jurisdiction over monetary claims for $10,000 or less involving alleged breaches of the government's express or implied contracts).

[50] 31 USC §3551(1); 40 USC §759(h)(9).

[51] *See* 5 USC §702 (APA standard applicable to district court *Scanwell* actions); 28 USC §1491(a)(3) (codifying FCIA standard applicable to CFC protests; directing that, in exercising its pre-award jurisdiction, the CFC "shall give due regard to the interests of national defense and national security"); 31 USC §3554 (GAO standard); 40 USC §759(h)(1) and (5)(B) (GSBCA standard); *see also* Sea-Land Services, Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979) (in *Scanwell* actions brought in the district courts, observing that contract award decisions should not be disturbed unless "there is no rational

While all tribunals focus on the existence of a statutory or regulatory violation or arbitrary agency conduct, there is some variation in the *scope* of the protest tribunal's examination into the decisionmaking processes of the purchasing agency. Three forums (the GAO, the CFC, and the district courts) engage in a comparatively narrow inquiry and impose a relatively heavier burden of proof on the protestor. In these forums, the claimant must establish a violation and its entitlement to relief by "clear and convincing evidence" (CFC),[53] by a preponderance of the evidence (district courts), or must overcome a presumption of correctness of the agency's action (GAO).[54] By contrast, the GSBCA assigns no presumption of correctness to the agency's actions and engages in a de novo determination of the relevant facts, including consideration of information that goes beyond facts contained in the agency's record.[55]

---

basis for the agency's decision" and "a showing of clear illegality is an appropriate standard to impose on an aggrieved bidder who seeks judicial relief"); NKF Eng'g, Inc. v. United States, 805 F.2d 372, 376 (Fed. Cir. 1986) (in actions before the Claims Court, a breach of the government's implied contract to treat all bids fairly and honestly occurs "if the contracting agency acts in an arbitrary and capricious, i.e., irrational or unreasonable, manner in rejecting the bid").

[52] *Compare* Professional Building Concepts, Inc. v. City of Central Falls, 974 F.2d 1, 4 (1st Cir. 1992) (rejecting protest where plaintiff "failed to demonstrate that the challenged action either had no rational basis or constituted a clear and prejudicial violation of applicable statutes and regulations"); Stay, Inc. v. Cheney, 940 F.2d 1457, 1463 (11th Cir. 1991) (emphasizing "the deferential standard of review" exercised by federal courts in *Scanwell* protest actions; endorsing GAO decision to reject protest where purchasing agency failed to comply with regulatory requirement and the agency's noncompliance was not prejudicial); United States v. Grimberg, 702 F.2d 1362, 1372 (Fed. Cir. 1983) (the Claims Court should use its protest jurisdiction to interfere with purchasing agency decisions "only in extremely limited circumstances"); CACI Field Services, Inc. v. United States, 13 Cl. Ct. 718, 725 (Cl. Ct. 1987) (observing that the standard of review exercised by the Claims Court in bid protest disputes "is extremely limited" and noting that protesters bear a "heavy burden of proof" in establishing their entitlement to relief); *M. Steinthal & Co.*, 455 F.2d at 1301 (emphasizing duty of district courts in *Scanwell* actions "to exercise with restraint the power to enjoin a procurement") *with* Lanier Business Prods., Inc., GSBCA No. 7702-P, 85-2 BCA ¶ 18,033, at 90,496 (in making its first bid protest decision, GSBCA states that "we decline to impose upon protesters the 'heavy burden' to show a 'clear and prejudicial' violation of law"); *see also* Alexander J. Brittan, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 *Pub. Cont. L.J.* 636 (1993) (contrasting GAO's requirement that protesters demonstrate that purchasing agency violations of procurement laws were "prejudicial" with GSBCA's refusal to sustain protests where the agency's errors were *de minimis*); *cf.* Andersen Consulting v. United States, 959 F.2d 929, 932 (Fed. Cir. 1992) (minimal errors in procurement do not compel Board to grant a protest).

[53] *See, e.g.*, Shields Enters. v. United States, 28 Fed. Cl. 615, 622 (Ct. Fed. Cl. 1993) (protester's recovery of bid preparation costs "may be had only upon showing of '*clear and convincing proof*' that award of the contract to another was arbitrary and capricious").

[54] *See* Science Application Int'l Corp., B-238136.2, June 1, 1990, 90-1 CPD ¶ 517.

[55] *See* 40 USC §759(f)(1) (GSBCA protests are "conducted under the standard applicable to review of contracting officer's final decisions by boards of contract appeals"); *see also* Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1046-47 (Fed. Cir. 1994) (in protest matters, GSBCA "is not limited to the

4. Procedural Features

Collection and presentation of evidence. Three of the forums provide claimants with relatively expansive tools for collecting and presenting evidence concerning alleged deviations from procurement statutes and regulations. Protestors proceeding before the CFC, the district courts, and the GSBCA can avail themselves of depositions, interrogatories, requests for admissions, and requests for the production of documents. Each of these tribunals also will issue protective orders by which counsel for the protestor and outside consultants can examine sensitive source selection information, including the winning offeror's proposal.[56] All three forums also provide for the examination and cross-examination of witnesses.

For most of its history as a protest tribunal, the GAO offered the weakest tools for claimants to collect and present relevant data. The GAO relied almost entirely on the submission of written reports by the parties and would largely defer to the agency's version of the facts.[57] The GAO amended its protest rules in 1988 and again in 1992 to increase the protester's ability to gather data about the agency's decisionmaking processes. Although GAO might dispute such an interpretation, these adjustments seem consistent with the hypothesis that competition from the GSBCA spurred GAO to change its procedures. Under its new rules, the GAO has begun to compel the production of documents, to allow examination of sensitive data under protective orders, and to conduct evidentiary hearings. These changes have increased the ability of parties to unearth facts needed to show that the agency acted unreasonably.

There is an evident relationship between the breadth of evidence-gathering and presentation procedures and the cost of pursuing a protest. Expansive data-collection — particularly the taking of depositions — can be expensive, and recourse to the full-blown procedures of the CFC, GSBCA, the district courts, and (more recently) the GAO greatly increases the cost of pursing a protest. Although it now provides a broader array of discovery tools, the GAO continues to offer an

---

findings made by the agency or contained in the initial decision. Under de novo review, a board may consider the analysis developed by the agency, or produce and consider its own analysis."); Lockheed Eng'g & Sciences Co., 94-2 BCA ¶ 26,885, at 133,821 ("We ... are not ordinarily concerned with the paper trail that the agency created; we make our own record."); *Lanier Business Prods.*, 85-2 BCA ¶ 18,033, at 90,495 ("[p]resumptions of agency correctness as sometimes applied at the GAO in the course of deciding protests cannot be permitted here"); American Bar Association, *Protest Experience, supra* note 8, at 37 ("Under *de novo* review, the GSBCA is not bound by the findings of the contracting officer, even if supported by the evidence, and can make independent findings of fact, drawing its own conclusions from the evidence.... *de novo* review permits the introduction of new facts and/or legal theories in support of the protest."); *cf.* Webber, *supra* note 43, at 3-7 (finding little difference between the level of scrutiny applied by the GAO and the GSBCA).

[56] *See, e.g.*, Frank K. Peterson, *In-House Counsel and Protective Orders in Bid Protests*," 21 PUB. CONT. L.J. 53 (1991) (discussing availability of protective orders in GAO and GSBCA protests).

[57] *See* Snow White Cleaners & Linen Supply, Inc., B-225636, March 26, 1987, 87-1 CPD ¶ 346.

austere protest procedure that allows the Comptroller General to decide the protest chiefly on the basis of written presentations by the parties. In its basic features, the GAO's austere protest process might be said to resemble a form of alternative dispute resolution. By virtue of this austere dispute resolution alternative, GAO provides the protest option with the lowest litigation costs.

Deadlines for resolving protests. All of the protest forums provide procedures for resolving protest disputes relatively swiftly. Before the CFC and district courts, a claimant can press protests through a motion for a temporary restraining order and a preliminary injunction. Both tribunals use accelerated procedures for deciding such motions. The GAO must decide protests within 90 working days from the filing of protests,[58] and the GSBCA must issue its decisions within 45 days of the protest. Both agencies routinely dispose of protests within the specified deadlines.

5. Remedies

The protest tribunals vary significantly in the remedies afforded claimants. The choice of forum affects the availability of equitable relief, monetary relief, and attorneys fees.

Equitable relief. The FCIA authorizes the CFC to issue an injunction and a declaratory judgment if the claimant files suit before the agency awards the contact.[59] As interpreted by the Federal Circuit, the FCIA did not give the CFC power to issue post-award equitable relief.[60] The murky language of the FCIA has created confusion about the equitable relief powers of the district courts in bid protest disputes.[61] Courts have uniformly concluded that the FCIA did not intend to divest the district courts of power to grant post-award equitable relief.[62] However, there is a division of authority among the courts of appeals about whether the district courts retain power to issue pre-award injunctions and declaratory judgments.[63]

---

[58] Protesters before the GAO also can avail themselves of an "express option" that provides for a decision by the Comptroller General in 45 days.

[59] 28 USC §1491(a)(3); *see also* United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed Cir. 1983) (en banc) (concluding that Congress, in enacting the FCIA, intended to limit the exercise of the Claims Court's equitable powers to claims brought to the court before the contract is awarded).

[60] *See Grimberg*, 702 F.2d at 1366-68.

[61] The authority of the district courts to award injunctive and declaratory relief generally is codified in 10 USC §§2201-2202. On the uncertainties created by the FCIA and *Grimberg* about the roles of the CFC and the district courts, see Joel R. Feidelman & Josephine L. Ursini, *Contract Formation Jurisdiction of the United States Claims Court*, 32 CLEV. ST. L. REV. 41 (1983); John S. Pachter, *The Need for a Comprehensive Judicial Remedy for Bid Protests*, 16 PUB. CONT. L.J. 47 (1986); Steven R. Sumison, *Injunctive Relief in the United States Claims Court: Does a Bid Protester Have Standing?*," 85 B.Y.U. L. REV. 803 (1985); Villet, *supra* note 30.

[62] *See* B.K. Instrument, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983); United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983).

A claimant who files a protest with the GAO or the GSBCA within ten days of the award of the contract is entitled to an automatic stay of performance.[64] The availability of an automatic stay stands in sharp contrast to the comparatively demanding standards that a claimant must satisfy to obtain a preliminary injunction before the CFC or a district court.[65] In protests filed with the GAO, the purchasing agency may decide unilaterally to proceed with the procurement if it determines that urgent and compelling circumstances warrant that performance continue.[66] For GSBCA protests, the suspension is mandatory unless the purchasing agency first persuades the Board that urgent and compelling circumstances dictate that performance proceed.[67]

GAO can recommend that the purchasing agency repeat a procurement, terminate an existing award, or award the contract to another party. GAO's views are advisory only. The purchasing agency must report to the GAO within 60 days after receiving GAO's recommendations if the agency has not complied fully.[68] GSBCA can order any of these outcomes, and has the power to suspend, revoke, or revise the purchasing agency's procurement authority.

---

[63] *Compare* In re Smith & Wesson, 757 F.2d 431, 435 (1st Cir. 1985) (FCIA did not divest district courts of jurisdiction in pre-award bid protest disputes); Coco Bros., Inc. v. Pierce, 741 F.2d 675, 678-79 (3d Cir. 1984) (concluding that Congress did not intend in the FCIA to divest the district courts of jurisdiction in pre-award bid protest disputes) *with* J.P. Francis & Assocs., Inc. v. United States, 902 F.2d 740, 742 (9th Cir. 1990) (FCIA divested district courts of pre-award jurisdiction); Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997-98 (4th Cir. 1987) (same).

[64] *See* 31 USC §3553(d)(1) (GAO post-award automatic stay provision). CICA also created an automatic stay for pre-award protests. After receiving notice from GAO of a pre-award protest, the purchasing agency must refrain from making an award until the protest is resolved. *See* 31 USC §3553(c)(1). An automatic suspension of the purchasing agency's procurement authority also is available for preaward protests filed with the GSBCA. *See* 40 USC §759(h)(2).

[65] *See, e.g.*, We Care, Inc. v. Ultra-Mark, Int'l Corp., 930 F.2d 1567, 1570 (Fed. Cir. 1991) (in an action for a preliminary injunction in a pre-award protest, the court must consider the degree of irreparable harm to the plaintiff, the degree of harm to the party being enjoined, the impact of an injunction on public policy considerations, and the likelihood of the plaintiff's success on the merits); *see also* Eric L. Lipman & James M. Read, *Summer to Summer: Recent Government Contracts Cases before the United States Claims Court*, 22 PUB. CONT. L.J. 1, 11-12 (1992) (discussing standard for obtaining preliminary injunction before the CFC).

[66] CICA permits the purchasing agency to override a GAO automatic stay. The district courts are available to review agency decisions to override the automatic stay pursuant to GAO protests. *See* Michael A. Riordan, *Federal Court Actions Challenging Agency Overrides of the CICA Stay*, 23 PUB. CONT. L.J. 397 (1994). Upon a showing of urgent and compelling need, GSBCA will lift the suspension of delegated procurement authority and allow the agency to proceed with performance in GSBCA protests.

[67] 40 USC §759(h)(3)(B). *See also* Steven W. Feldman, *Interim Suspension Authority of the General Services Board of Contract Appeals in Automatic Data Processing Protests: Legal and Practical Considerations*, 17 PUB. CONT. L.J. 1 (1987) (discussing GSBCA's automatic stay powers in bid protests).

Monetary relief. The CFC and GSBCA can order that the government pay the claimant its bid and proposal costs, and the GAO can recommend that such costs be reimbursed.[69] The district courts also can award bid and proposal costs, but only up to $10,000.[70] Because recovery of damages is capped at $10,000, protest suits for damages before the district courts are extremely rare.

Attorneys' fees and costs. Under CICA, the GSBCA can order the payment of the attorneys' fees incurred by prevailing protesters,[71] and the GAO can recommend the payment of such fees.[72] The CFC and the district courts lack power to grant such relief. The availability of attorneys' fees for successful protests before the GAO and the GSBCA has been an important factor accounting for the popularity of these forums. The attorneys' fees provisions also have spurred the creation of a substantial practice area for the private bar. In general, the bid protest bar has actively opposed any weakening of the protest mechanism.

6. Settlements

The parties to a protest often settle contract formation disputes and voluntarily dismiss protests. Settlements typically do not involve oversight by or require the approval of the tribunal with which the protest has been filed. Some observers argue that the lack of authority for protest tribunals to review settlement terms permits purchasing agencies to subvert the protest system's aims by paying protesters "Fedmail" to abandon challenges to procurement decisions that undermine taxpayer interests.[73]

7. Appeals

Appeals from the decisions of the CFC and the GSBCA must be taken to the U.S. Court of Appeals for the Federal Circuit.[74] Appeals from protest-related decisions of the district courts are taken to the court of appeals for the circuit in which the district court sits. There is no direct path of appeal from GAO decisions. Protestors who file claims with the GAO retain the right to file subsequent suits before the CFC or the district courts.[75] In reviewing protests previously considered by the GAO, the CFC and the district courts have been admonished by appellate courts to accord substantial deference to the Comptroller General's views.[76]

---

[68] In January of each year, the GAO must report to Congress about all instances in which agencies have declined to follow its recommendations. 31 USC §3554(e)(2). Owing to the GAO's close relationship to Congress, agencies do not casually decide to ignore the Comptroller General's views.

[69] *See* 4 CFR §21.6(d)(2) (GAO authority to award bid and proposal costs); AT&T Technologies, Inc. v. United States, 18 Cl. Ct. 315 (1989) (Claims Court award of bid and proposal costs).

[70] 28 USC §1346(a)(2).

[71] 40 USC §759(f)(5)(C).

[72] 4 CFR §21.6(d)(1) (GAO authority to award attorneys' fees and costs of filing protest).

[73] *See* Marshall et al., *Multiple Litigants With a Public Good Remedy, supra* note 7.

[74] The Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982. The Federal Circuit succeeded to major elements of the jurisdiction of the former U.S. Court of Claims. The judges of the new Federal Circuit were drawn from the former Court of Claims and the U.S. Court of Customs & Patent Appeals.

8. Substantive Competence of the Protest Tribunals

Measured by their grasp of government contract law, the GAO and the GSBCA are generally seen as the most competent of the protest forums. The judges of the CFC hear a larger number of government contracts cases than the typical federal district judge and have more familiarity with government procurement issues.[77]

C. Trends in Use and Performance Over Time

The GAO and GSBCA are overwhelmingly the forums of choice for protesters, with the CFC and district courts ranking third and fourth, respectively. As compiled by the Section 800 Committee, the Table below reliably indicates the relative frequency of use of these forums:

Filings of Bid Protests 1988-1991

Year	GAO	GSBCA	CFC
1988	2633	215	8
1989	2673	283	23
1990	2489	268	19
1991	2887	250	17

Source: Section 800 Committee Report, Chapter 1, at 1-206.

The Section 800 panel did not compile statistics on filings in the district courts. A LEXIS/WESTLAW search of reported decisions in the 1988-1991 period suggests that filings in the district courts are likely to be fewer than 25 cases per year. A separate survey of district court protests for Fiscal Years 1992 through 1994 identified a total of 42 decisions in that period.[78] Assuming a rough correlation between inputs (filings) and outputs (decisions), these data are consistent with my own findings for the 1988-1991 period.[79] On the whole, it seems safe to assume that protester recourse to the federal district courts is comparatively rare. An examination of the types of cases that have been filed in the CFC and the district courts suggests that litigants usually resort to these forums (a) when the subject matter does not involve ADPE or telecommunications equipment (thus precluding recourse to the GSBCA) or (b) where there are doubts about the authority or willingness of GAO to review a procurement decision.

---

[75] *See* American Bar Association, *Bid Protest Experience*, *supra* note 8, at 53-54; *see also* McCarty Corp. v. United States, 499 F.2d 633 (Ct. Cl. 1974) (decision by Court of Claims awarding bid and proposal costs to protestor who unsuccessfully had sought a GAO opinion recommending the termination of a contested contract).

[76] *See* Honeywell, Inc. v. United States, 870 F.2d 644, 647-48 (Fed. Cir. 1989); *M. Steinthal & Co.*, 455 F.2d at 1304-05; John Reiner and Co. v. United States, 325 F.2d 438, 442 (Ct. Cl. 1963); *cf.* Irvin Indus. Canada, Ltd. v. United States Air Force, 924 F.2d 1068, 1077 n.88 (D.C. Cir. 1990) ("We ... 'regard the assessment of the GAO as an expert opinion, which we should prudently consider but to which we have no obligation to defer'" [citation omitted]).

[77] As discussed below in Section III, it is difficult to discern from the published opinions of the CFC and the district courts a difference in analytical techniques or sophistication.

In ADPE and telecommunications equipment procurements, the GSBCA has eclipsed the GAO as the preeminent protest forum. The relative attractiveness of the GSBCA to protesters has resulted chiefly from the Board's more critical attitude toward government purchasing agencies and the superior tools it affords protesters to obtain information about the government's decisionmaking processes.

Outcomes in protests before the GAO and the GSBCA, respectively, reflect the Board's greater appeal to offerors. Protesters generally have enjoyed a higher success rate before the GSBCA.[80] In recent years the disparity in success rates in protests decided by the GSBCA and the GAO has narrowed. A major reason for the shrinking of the difference between GAO and GSBCA outcomes has been some degree of convergence in the standard and scope of review applied by these bodies. This convergence has flowed mainly from a weakening of the GAO's presumption of agency correctness and a greater hesitation by the GSBCA in recent years to interfere with purchasing agency choices. The expansion of discovery tools available from the GAO also has increased the ability of protesters to prevail before that body.

---

[78] *See* Lieberman, *supra* note 13, at 9.

[79] Not all case filings result in observable events that are reported in judicial opinions or trade press accounts of government contracts litigation. Consequently, a search of electronic and manual data bases is likely to understate the amount of filings. The magnitude of such an understatement for protests in the district courts is impossible to assess, as the data collection system by which the Administrative Office of the U.S. Courts monitors trends in case filings does not track bid protests.

[80] *See* Lieberman, *supra* note 13, at 5 (comparing outcomes at the GAO, the GSBCA, the CFC, the federal district courts, and the United States Postal Service); Webber, *supra* note 43, at 22 (compared to the GAO, "the Board offers the protester a greater chance of success where the subject matter of the procurement is ADP equipment or services").

II. Third Party Monitoring

The engine of the modern bid protest mechanism is third party monitoring.[81] Rather than depend on government agencies to monitor compliance (for example, by using auditors) with contract formation rules, the protest process delegates enforcement authority to third parties — namely, potential or actual offerors — who have a stake in the procurement outcome. Not only does the protest mechanism give interested private parties a central enforcement role, but it also supplies strong incentives to exercise the enforcement function. As indicated above, the protest machinery provides powerful remedies, including the issuance of an injunction to cease performance of a challenged contract and the award of attorneys fees to protestors who obtain relief.

A. Rationales for Robust Third Party Monitoring

Commentators have advanced three basic theoretical rationales for establishing robust mechanisms for monitoring the contract award decisions of government purchasing officials. This segment of the paper presents these rationales and then describes why some observers conclude that monitoring by interested third parties is the superior mechanism for protest oversight.

The first suggested rationale for expansive monitoring is that government purchasing officials have weaker incentives to make optimal procurement choices than their private sector counterparts. Thus, powerful oversight tools are needed to ensure that government officials make appropriate procurement decisions. In terms commonly used in modern academic commentary about the protest process, a robust protest system helps cure principal-agent problems that arise in the public procurement system. The protest mechanism helps cure principal-agent problems by increasing the likelihood that deviations by the agent (the purchasing agency) from the guidance of the principal (Congress) will be detected and corrected.[82] Thus, protests press government officials to make price and quality choices that maximize benefits for taxpayers.

---

[81] *Cf.* Julie Research Lab, Inc., GSBCA No. 8070-P-R, 8602 BCA ¶ 18,881 (1986) (observing that CICA's legislative history concerning the GSBCA's protest jurisdiction "makes it very clear that the intent of Congress ... was to encourage private enforcement of the laws and regulations mandating the acquisition of general purpose automatic data processing equipment and services through full and open competition").

[82] *See* Greenstein, *supra* note 6, at 164-66; Marshall et al., *Private Attorney General*, *supra* note 6, at 11. The use of interested parties to monitor agency compliance with congressional directives is discussed in Matthew M. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control of Agencies*, 75 VA. L. REV.

Commentators point to several conditions as explaining why government purchasing officials tend more often to fail to maximize taxpayer interests than private purchasing officials fail to maximize shareholder interests.[83] Government purchasing officials are often said to place inordinate weight on product quality in the decisionmaking calculus and thus to fail to make appropriate quality-price tradeoffs.[84] This "quality bias" precludes adequate consideration of the products of offerors who could satisfy the government's genuine needs at a lower price.[85] In other instances, government purchasing officials are said to skew specifications and source selection decisions to favor incumbent suppliers. A further contributing factor is the inability of government purchasing officials to receive adequate rewards for making procurement choices that benefit taxpayers. The lack of means to reward government purchasing officials more generously for efficient procurement decisions causes such officials to underinvest in activities that maximize taxpayer interests.[86]

A second rationale offered by commentators for expansive monitoring is that government purchasing officials, on the whole, are less competent than private sector purchasing agents with comparable responsibilities. The assumption of relatively weaker capability finds some support in the conclusions of blue-ribbon panels that have studied the procurement process. Among these is the Packard Commission on Defense Management, which observed in 1986 that "compared to its industry counterparts, [the Department of Defense contracting] workforce is undertrained, underpaid, and inexperienced."[87] The protest process (and other forms of government procurement regulation) can be viewed as compensating for deficiencies in the skills of government purchasing personnel by reducing their discretion and subjecting their decisions to more exacting oversight.

A third suggested rationale for close monitoring of purchasing decisions is that the protest process provides a needed safeguard against the creation of inappropriate relationships between purchasing agencies and incumbent suppliers

---

431 (1989); Matthew M. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

[83] *See* Marshall et al., *Incentive-Based Procurement Oversight*, *supra* note 6; Marshall et al., *Private Attorney General*, *supra* note 6.

[84] *See, e.g.*, Shane M. Greenstein, *Did Installed Base Give an Incumbent Any (Measurable) Advantages in Federal Computer Procurement?*, 24 RAND J. ECON. 19 (1993) (discussing incentives for government officials to overemphasize quality in buying computers); William P. Rogerson, *Quality versus Quantity in Military Procurement*, 80 AM. ECON. REV. 83 (1990) (discussing technology bias in defense procurement).

[85] *See* Marshall et al., *Curbing Agency Problems*, *supra* note 6.

[86] *See* Marshall et al., *Private Attorney General*, *supra* note 6, at 14-15.

[87] President's Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report of the President's Blue Ribbon Commission on Defense Management* 66 (June 1986); *see also* Marshall et al., *Private Attorney General*, *supra* note 6, at 7 ("compared to their private sector counterparts, government buyers are often not well informed about the product that they are buying").

through which incumbent suppliers induce government agencies to write specifications that prevent equally or more efficient firms from bidding for new contract awards. Although private purchasing agents also are exposed to efforts by suppliers to distort their judgment against their employers' best interests, it is suggested that government officials are more prone to succumbing to these temptations, due to lower pay scales and other weaknesses in the incentive systems used to motivate public employees.[88]

If one assumes that extensive monitoring of government purchasing decisions is necessary, there remains the question of how such monitoring should take place. Commentators who endorse a robust protest system argue that third-party monitoring is superior to other forms of oversight in motivating purchasing officials to make decisions that maximize taxpayer interests. One alternative to protests is to rely on *ex post* auditing of purchasing agency decisions by external observers (such as the GAO's auditing unit) or by entities within the agency (such as the inspector general, the competition advocate, or the Defense Contract Audit Agency). Following a review of completed purchasing episodes, such authorities could recommend rewards or punishments for procurement officials, could suggest adjustments in acquisition procedures and techniques, or, conceivably, could propose a payment of damages (such as bid and proposal costs) to wrongfully excluded offerors.

To advocates of protest oversight, the relative superiority of decentralized enforcement is that self-interested "private attorneys general" are likely to have better information than auditors about deviations from procurement statutes and regulations. For example, an excluded supplier may be in the best position to determine whether the specifications contained in an agency's solicitation for the purchase of computers is technically justified, given the agency's statement of its needs. Moreover, *ex post* auditing has its own costs, including the employment of auditors and the expense associated with collecting and analyzing information about procurements selected for study.

B. Disadvantages of Expansive Third-Party Monitoring

Commentators have raised various objections to the existing protest oversight scheme. This section reviews five basic criticisms of robust decentralized private monitoring of government procurement decisions.

The first criticism is that protests can significantly delay a government agency's acquisition of goods and services. The delayed delivery of needed products can impose substantial costs on the agency in the form of reduced productivity and delayed performance of agency functions.[89]

---

[88] *See, e.g.*, Marshall et al., *Private Attorney General*, *supra* note 6, at 8 ("In the public sector, the lack of profit incentives and various institutional constraints limit the power of incentive contracts to align the interests of a procurement official closely with those of the government.").

A second objection is that protests force agencies (and private firms) to devote great resources to responding to and litigating protests.[90] These resources take the form of time expended by attorneys as well as procurement decisionmakers within the purchasing agency and by its vendors. Prosecuting and defending protests can be expensive, particularly when the protest is adjudicated in a forum (such as the GSBCA) which permits expansive discovery.

A third criticism is that the protest process may be prone to strategic misuse by private offerors who are seeking to impede the ability of rival offerors to do business with the government.[91] By filing a protest, an incumbent supplier might delay a contract award or compel the purchasing agency to repeat the competition. Here the protest can force a new (and perhaps thinly capitalized) entrant to spend substantial resources intervening to defeat the protest. The strategic filing of protest actions can be an attractive exclusionary tool because, unlike in a predatory pricing campaign, the predator can force the target of the strategy to bear costs that equal or exceed its investment in the predatory tactic.

A fourth criticism is that protests may discourage government purchasing officials from exercising appropriate degrees of discretion (e.g., by relying on intangible considerations such as the quality of past performance) in making new contract awards.[92] Particularly for products requiring extensive post-sale services (such as photocopiers, communications systems, and computer networks), it may be impossible for buyers and sellers to specify by contract all dimensions of performance that are important to the buyer. Vendors vary considerably in their responsiveness to user needs and in their willingness to take extra steps to anticipate and solve purchaser problems, especially where the bare terms of the contract would not require such effort. It may be infeasible to draft a contract provision that captures this ingredient of performance, yet the buyer's future purchasing decisions surely depend on her assessment of how often her existing vendor "went the extra mile" to serve her needs. By pressing procurement officials to rely on "objective" criteria, a robust protest process may discourage consideration of admittedly subjective but important variables involving past performance.[93]

---

[89] *See* Cohen, *supra* note 14, at 21-24.

[90] *See* Cohen, *supra* note 14, at 22. Senator Cohen's report states that the high cost of opposing protests before the GSBCA sometimes causes agencies to pay "Fedmail" to protestors who "have no chance of winning a contract." *Id.* at 23.

[91] *See* Robert E. Lloyd, *Efficiency, Justice, and Rent-seeking in Federal Contract Dispute Resolution*, in CONFLICT RESOLUTION AND PUBLIC POLICY 101 (Miriam K. Mills, ed. 1990).

[92] *See* S. Kelman, *supra* note 6, at 21; *see also* Greenstein, *supra* note 6, at 162 (enforceable procedural rules may not be ideal for regulating complex agency actions such as certain procurement activities).

The fifth objection is that, unless settlements are subject to close scrutiny by the protest tribunal, the protest process might serve as a vehicle through which competing offerors coordinate their behavior to raise the price that government agencies will pay for goods and services.[94] Participants in a bid-rigging scheme might use the filing of protests and the execution of settlements (including the making of side-payments between vendors) to coordinate their behavior.[95] Bid-rigging on public procurement contracts often takes the form of a "bid rotation" scheme through which a cartel determines which of its members will submit the low, winning bid for each procurement.[96] The protest enables cartel participants to challenge an award to a cartel member who cheats on the collusive agreement by bidding low "out of turn." Unless subject to close scrutiny, the settlement process can facilitate efforts to enforce the original cartel agreement by enabling cartel members to extract a side payment from a maverick participant.

C. Summary of the Policy Debate

The existing system of restraints on government discretion is purposeful and flows from several considerations. It reflects the belief that protests have spurred competition that generates substantial savings to government agencies, and it reflects basic doubts about whether government officials will exercise discretion to the benefit of taxpayers. The existing protest system can be costly, but its adoption reflects the view that the costs of protest controls are less than the costs of greater discretion. Relaxing controls could reduce some costs, but only by assuming the risk that some purchasing officials will use their discretion unwisely.

Current decisions about the optimal configuration of the protest system are taking place in a virtual empirical vacuum. There is scant empirical evidence for judging whether public purchasing officials are more prone to "shirk" in maximizing taxpayer interests than private purchasing officials are to shirk in maximizing shareholder interests, or what net effect the modern system of protest controls (especially since CICA in 1984) has had on procurement outcomes.

---

[93] This raises the issue of the type of data (if any) the purchasing agency will be required to produce to justify decisions based on past performance. Given pervasive, recurring concerns about preserving the integrity of the procurement process and about the incentives and capabilities of government procurement officials, it is unlikely that source selection teams will be permitted to rely simply on undocumented views about the past behavior of rival offerors. Instead, government agencies are likely to be required to create and maintain purchasing agency data bases that accurately assess and record past performance by contractors. Critics of the use of past performance as a selection criterion have warned that, in the absence of a reliable data base, judgments about past performance could be largely impressionistic or could be based on faulty data.

[94] *See* Marshall et al., *Incentive-Based Procurement Oversight, supra* note 6, at 51.

[95] *See* Marshall et al., *Private Attorney General, supra* note 6, at 52-55.

[96] *See* William E. Kovacic, *Illegal Agreements with Competitors*," 57 ANTITRUST L.J. 517 (1988).

III. Optimal Forum Mix

A. Recent Reform Proposals

1. Section 800 Committee

The Section 800 Committee proposed three far-reaching reforms of the protest mechanism. First, the Committee proposed that Congress consolidate all federal court protest jurisdiction in the Court of Federal Claims. Such a move would eliminate *Scanwell* jurisdiction and thus withdraw from the federal district courts the power to review contract formation decisions.

Second, the Committee urged Congress to amend the Competition in Contract Act to establish a more permissive standard of review for the GSBCA. The Committee would have eliminated the GSBCA's de novo review of the facts and, in effect, would have required the Board to apply the more deferential standard (a presumption of agency correctness) used by the GAO.

Third, the Committee proposed that Congress authorize the GAO and the GSBCA to impose stronger sanctions on parties who file "frivolous" protests. The stronger sanctions would include requiring the party filing a baseless protest to reimburse the government for its legal fees and costs associated with defending the government's purchasing decision.

2. Legislative Measures

As noted in the Introduction to this paper, the Federal Acquisition Streamlining Act makes few changes that affect the choice of forum in bid protest disputes. In particular, the Act does not alter the existing structure of dispute resolution forums, nor does it adjust the standard of review to be applied by any single forum. The Senate version of the Act embodied the Section 800 Committee recommendation to consolidate federal court protest jurisdiction in the CFC, but the Senate abandoned this position in the conference committee deliberations. The Clinton Administration recently proposed significant changes to the protest system, including the consolidation of federal court jurisdiction in the CFC and the elimination of the GSBCA's de novo standard of review.

B. Multiplicity and Public Administration: Overview

Duplication of federal government activities exists in a variety of contexts. In a number of instances two or more federal agencies bear responsibility for providing specific services. For example, national intelligence gathering authority is distributed among the Central Intelligence Agency, the Department of State, and various bureaus of the Department of Defense (DoD). The Air Force, the Army, and the Navy compete against each other for funding and programs to fulfill national security missions.[97] Federal antitrust enforcement authority is shared by the Department of Justice and the Federal Trade Commission (FTC), and the two agencies compete to establish preeminence as the leading government bureau for the scrutiny of many forms of business conduct, including mergers.[98] The Securities and Exchange Commission and the Commodities Futures Trading Commission compete for the right to regulate certain segments of the securities industry.[99]

Nor is the protest system unique simply because it duplicates adjudication functions. Many federal antitrust claims are subject to adjudication either in the federal district courts or through the administrative procedures of the FTC. What makes the public contract system distinctive is how broadly adjudicatory authority is spread among distinct decisionmaking bodies.

C. Rationales for Multiple Protest Forums

Four basic rationales can be offered to support the retention of multiple protest forums. Each rationale is considered below.

Ensuring execution of congressional policy preferences. First, the establishment of multiple, competing "agents" may be the most effective means for Congress to ensure that its policy wishes are executed faithfully. As an alternative strategy, Congress could have bolstered GAO's protest authority and applied more pressure directly to the Comptroller General to adopt a more favorable view of protests. But the creation of a second agent (and the rivalry it would engender between GAO and the GSBCA) may have been seen as a more effective motivational tool. By giving the GSBCA protest jurisdiction that overlapped the protest jurisdiction of the GAO, Congress in effect made the GAO's protest authority "contestable" and spurred GAO to take a more sympathetic view of protestors' claims (the congressionally preferred outcome) and to adopt discovery procedures that increased the ability of protestors to challenge agency procurement choices.[100] Competition between the GAO and the

---

[97] *See* Thomas L. McNaugher, NEW WEAPONS, OLD POLITICS: AMERICA'S MILITARY PROCUREMENT MUDDLE (1989).

[98] *See* Richard S. Higgins, William F. Shughart II & Robert D. Tollison, "Dual Enforcement of the Antitrust Law," in *Public Choice and Regulation: A View from Inside the Federal Trade Commission* (Robert J. MacKay, James C. Miller III & Bruce Yandle, eds. 1987).

[99] *See* John C. Coffee, Jr., *Competition versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 1 (1995).

[100] There is some evidence that Congress gave protest jurisdiction to GSBCA as part of a conscious strategy to use competition between the GAO and the GSBCA to gain increased scrutiny of government

Board generated the congressionally-desired outcome — more exacting oversight of purchasing agency decisionmaking.

Stimulating improvements in protest forum behavior. A second, closely related rationale is that competition among rival government forums may result in innovation that improves the quality or reduces the cost of the service being provided. The impact of rivalry is evident in the relationship between the GAO and the GSBCA. In many respects, the creation of GSBCA's protest authority is the most interesting modern federal experiment with inter-agency competition as a means of increasing the output and quality of a government service. By the end of the 1980s, the GSBCA had established itself as the preferred forum for vendors protesting procurements involving ADPE or telecommunications products.[101] The perception of this fact prompted GAO to drastically change its protest "product" to attract disappointed offerors. Thus, rivalry between the GAO and the GSBCA has significantly altered the federal government's provision of protest services.

The impact of competition between the GAO and the GSBCA can be seen in several areas. Since 1984, the GAO and the GSBCA have engaged in procedural innovations to make each forum more attractive to protesters.[102] More than any nominal departure from the GAO's standard of review, it was the GSBCA's more powerful discovery tools that enabled protesters to gain access to relevant data and challenge purchasing agency decisions more effectively. Without the GSBCA's presence in the protest arena, it is doubtful that the GAO would have expanded so extensively the ability of protestors to gather facts needed to demonstrate infirmities in purchasing agency decisions.[103] Rivalry from GSBCA also appears to have induced GAO to give protestors a more attractive menu of

---

purchasing agency decisions. Late in 1984, Representative Frank Horton, one of CICA's principal co-sponsors, told a trade association group that CICA "will build into the bid protest system a little competition, which we hope will prompt the GAO to improve its performance." Frank Horton, "Speech to the Computer and Communications Industry Association" (Dec. 13, 1984). It is apparent that Congress perceived GAO as excessively hostile to protests. A House Committee report on the forerunner of CICA expressed concern that, in fiscal years 1981-83, GAO had sustained only 7.3 percent of all protests brought before it. H.R. Rep. No. 1157, 98th Cong., 2d Sess. 23-24 (1984). One of CICA's cures for this inadequacy was to bolster GAO's protest authority. But the second approach was to establish a competing institution (GSBCA).

[101] *See* Webber, *supra* note 43, at 2.

[102] That the GAO and the GSBCA regard each other as rivals, and see each other as competitors for bid protest cases, is evident from public comments by members of both bodies. *See, e.g.*, Stephen Daniels, *New Directions for the General Services Board of Contract Appeals*, 28 Pub. Cont. Newsl. 3, 3 (Spring 1993) (GSBCA Chairman Daniels: "The GAO continued to acknowledge that the Board's protest procedures work so well that they should be adopted (at least in part) by that competing forum.").

[103] For example, in retooling its protest rules in 1991, GAO authorized the issuance of protective orders to permit counsel for the protester to have access to proprietary or source selection information. *See* 4 CFR §21.3(d) (1993). Doing so was essential if GAO were to match an attractive (to protesters) attribute of GSBCA protest procedure. For a discussion of the GSBCA's use of protective orders in the period proceeding the GAO rules changes, see Michael A. Hordell & Eric L. Lipman, *The Rise and Use of Protective Orders at the General Services Board of Contract Appeals*, 20 PUB. CONT. L.J. 22 (1990).

remedies for successful protests.[104] A consolidation of protest jurisdiction that eliminated competition between the GAO and the GSBCA would diminish incentives for these forums to innovate by improving protest procedures.[105]

Competition also has affected the level of scrutiny that the GAO and the GSBCA, respectively, apply in reviewing purchasing agency decisions. At first, GSBCA performed a more probing assessment of agency decisions. The Board's de novo inquiry into the facts facilitated a more critical analysis of agency behavior than the GAO's traditional presumption that the agency's version of the facts was correct. More generally, the outcome and tone of many GSBCA decisions initially suggested comparatively greater skepticism about agency purchasing choices.[106]

Recent protest experience has featured some convergence of GAO and GSBCA analysis. GAO has tended to treat agency arguments less deferentially, and the GSBCA has retreated from the more exacting scrutiny it engaged in during the first six or so years of its protest jurisdiction.[107] As one measure of this analytical convergence, protester success rates in recent years before the two forums have been comparable. It is also apparent that each forum is aware of, and has borrowed from, analytical approaches developed by its counterpart.[108]

---

[104] In 1991, GAO altered its protest rules to enable protesters to recover attorneys' fees and protest costs when the purchasing agency took steps to correct contracting flaws at any time after a protest had been filed. *See* 4 CFR §21(6)(e) (1993). This precluded purchasing agencies from avoiding such costs by curing deficiencies soon before the GAO issued a protest decision.

[105] *See, e.g.*, Daniels, *supra* note 102, at 26 ("[T]here is a considerable disadvantage to having only one protest forum: it would destroy the kinds of competition among forums that we have today — competition to develop the most efficient and effective kinds of practices and procedures for the suits that are filed, and competition to write the best-reasoned, most persuasive legal and factual analyses possible.").

[106] *See* Computer Lines, GSBCA No. 8206-P, 86-1 BCA ¶ 18,653; *see also* Webber, *supra* note 43, at 16 ("despite reliance on a similarly articulated standard of review, the GSBCA has demonstrated a greater willingness than GAO to overturn agency evaluation and selection decisions which are arbitrary or unreasonable").

[107] The Federal Circuit has constrained what might be characterized as efforts by GSBCA to increase its attractiveness to protesters. *See, e.g.*, AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205-07 (Fed. Cir. 1993) (reversing GSBCA decision upholding protest by telecommunications firm which alleged that a modification to the FTS 2000 contract exceeded the scope of the original contract and required competitive bidding); Best Power Technology Sales Corp. v. Austin, 984 F.2d 1172, 1176-78 (Fed. Cir. 1993) (ruling that GSBCA lacks jurisdiction under Brooks Act to resolve protest involving uninterruptable power supply units used in connection with ADPE systems); US West Communications Services, Inc. v. United States, 940 F.2d 622, 627-29 (Fed. Cir. 1991) (ruling that GSBCA lacks jurisdiction to grant bid protest of prospective subcontractor); Data General Corp. v. United States, 915 F.2d 1544, 1551-52 (Fed. Cir. 1990) (ruling that GSBCA lacks authority to "second guess" purchasing agency's assessment of its needs). Without Federal Circuit oversight, it is evident that the deviation in protest outcomes between the GAO and the GSBCA would be more pronounced. *But see* Birch & Davis Int'l v. Christopher, 4 F.3d 970, 973-74 (Fed. Cir. 1993) (vacating GSBCA order that upheld the contracting officer's reduction of the competitive range to a single firm; concluding that the GSBCA had failed to focus on whether the contracting officer had made specific findings showing the excluded protester had no chance of receiving an award).

A third, more imponderable dimension of rivalry deals with the qualitative effect of GAO and GSBCA decisionmaking, respectively. Has rivalry between the two forums improved the quality of protest decisionmaking and, indirectly, spurred improvements in purchasing agency behavior? As suggested in Section III.E below, this question requires a fuller empirical inquiry. The answer to this question depends less on an analysis of comparative administrative efficiency and more on one's judgment about the value of external, protest-based oversight of government agency purchasing decisions. Ideally, such judgments would be informed by systematic empirical evaluation of the impact of protests on the quality of government procurement choices.

Although rivalry has altered the behavior of the GAO and the GSBCA, no similar adjustment is evident in the modern protest decisionmaking of either the CFC or the district courts. The GAO and the GSBCA regard protest jurisdiction as desirable, and each agency has strived to attract protest "business." No such institutional desire is apparent from the conduct of the two judicial forums. The post-1980 behavior of the CFC and the district courts reveals no effort by either judicial tribunal to make itself more attractive than its judicial counterpart as a forum for resolving protests. There is no evidence that the CFC and the district courts "compete" in any meaningful way in deciding protests, nor has the conduct of these courts — for example, subtle changes in the articulation or application of the standard or scope of review, or an increase in protester success rates — suggested that the possibility of a diversion of protests to the GAO and the GSBCA mattered to these tribunals.

In sum, in the routine disposition of protests since the FCIA in 1982 and CICA in 1984, the CFC and the district courts have displayed no competitive response from which one could infer that either tribunal regards protests as an attractive element of its jurisdiction. The opinions of the district courts and the courts of appeals other than the Federal Circuit sometimes comment about the "complexity" of procurement legal issues — a pattern mildly suggestive of displeasure in having to address such matters. There is little reason to think that the average U.S. district judge or the average court of appeals judge would complain about the loss of protest jurisdiction. The behavior and opinions of the

---

[108] The GSBCA recently ruled that a purchasing agency may consider the risk associated with vendor proposals when the agency evaluates such proposals, even though the solicitation does not specify risk as an evaluation factor. *See* US Sprint Communications Co. v. Department of Defense, GSBCA No. 11769-P, 93-1 BCA ¶ 25,255. In denying Sprint's protest of the award of a contract for a leased communications system, the GSBCA favorably cited GAO opinions that allowed the purchasing agency to consider risk as an inherent part of the evaluation process. *See* Communications Int'l, Inc., B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194.

CFC display no inclination to resist encroachment by the district courts, the GAO, or the GSBCA. However, one might expect the CFC to resist any effort to formally withdraw its protest jurisdiction, as such a measure might raise questions about the usefulness of preserving this specialized judicial tribunal.

Increasing public confidence in the fairness of certain protest decisions. Protest forums may vary according to how the public perceives their capacity to render fair, impartial rulings in certain types of protest disputes. The judicial protest forums (the CFC and the district courts) may be viewed as more likely to review sensitive procurement program choices using "nonpolitical" criteria, particularly where difficult DoD downsizing decisions are concerned. The availability of protests before the federal courts may increase public perceptions that a neutral arbiter has heard the protester's arguments. Perceptions of institutional and political neutrality might be lacking if the decision rested with an entity having strong ties to Congress (the GAO) or the executive branch (the GSBCA).

One possible illustration is the disposition of the protest by Tenneco and its Newport News shipyard of the Navy's decision in 1990 to award the initial development contract for the Seawolf nuclear attack submarine to the Electric Boat Division of General Dynamics. The award of the development contract promised to have a major impact on the economic fortunes of the two companies, and a severe impact upon employment in the communities in which each firm operates. Tenneco filed its protest in Norfolk in the U.S. District Court for the Eastern District of Virginia and obtained an injunction staying performance of the billion-dollar contract. The Navy persuaded the Fourth Circuit to vacate the injunction and to sustain the contract award to General Dynamics. Current and former Navy officials interviewed for this paper have suggested that the protest decision by the federal judiciary had credence that a decision by the GAO (the most likely alternative protest venue for a dispute involving a major weapon system) could not provide.[109]

Increasing access to the protest process. The wide distribution of protest authority and the diversity of protest alternatives makes the protest process more accessible to disappointed bidders. The existing structure of protest forums supplies a mix of low cost (GAO) and higher cost (e.g., GSBCA) options, although a single forum — such as an administrative entity that combined attributes of the GAO and the GSBCA — could offer both austere and elaborate protest options for disappointed vendors. The district court *Scanwell* action provides geographic accessibility that the GAO, the GSBCA, and the CFC lack. GAO and GSBCA proceedings take place in Washington, D.C. Although the CFC's jurisdiction is national in scope, and the CFC has power to hold proceedings outside of Washington, D.C., the CFC cannot readily make arrangements in a manner that matches the convenience to a protester of filing a preliminary injunction action in the local district court.

---

[109] The Seawolf litigation also suggests that the federal courts are not wholly apolitical protest tribunals. The decision of the district court in Norfolk to enjoin performance of the Seawolf contract may have at least partly reflected the court's concern about the adverse impact of the Navy's decision in the local community. *Compare* Thomas K. Gump, *Rationalizing the Procurement Dispute Process*, 42 FED. LAW. 20, 22 (Feb. 1995) (noting that a federal district judge in a bid protest matter "has great opportunity during the initial injunctive proceeding to be influenced by external factors" such as the impact of a contract award decision on the local economy).

D. Costs of Multiplicity in Protest Forums

Commentators have identified three basic disadvantages of continuing to adjudicate protests through the existing array of forums.

Increased government expenditures for the administration of the protest system. The existing system of diverse alternatives requires the government to bear recurring administrative costs associated with maintaining multiple protest venues and with supporting the protest-related activities of each forum. GAO and the GSBCA devote a substantial amount of resources to resolving protests, but it is not clear that a significant percentage of the protest resources spent by these agencies are duplicative. The most frequently proposed path of consolidation for the GAO and the GSBCA would be to fold their protest operations into a single entity — perhaps by establishing a new executive branch agency that would offer an austere protest path (akin to GAO) and a quasi-judicial protest path (akin to GSBCA).[110] Unless the law were changed to make the prosecution of protests more difficult (thus, reducing the volume of protests), it is likely that the new protest entity would need to employ roughly as many professional staff and support staff as are now engaged in the resolution of protests today at the GAO and the GSBCA combined. The savings to the government in out-of-pocket costs from combining the protest functions of these bodies probably would be trivial.

Curtailing or eliminating the protest jurisdiction of either the CFC or the district courts will generate similarly modest administrative cost savings. The CFC and the district courts hear so few protests each year that it is difficult to imagine that eliminating their protest oversight powers would permit a reduction in personnel. Each CFC judge is assigned an average of barely more than one new protest case per year, and the federal district courts combined probably receive fewer than fifteen to twenty new protest filings annually. For the judicial forums, the incremental administrative cost of resolving protest disputes is minuscule.

---

[110] *See* Section 800 Committee, *supra* note 9, at 1-216 to 1-218.

In sum, the consolidation of the protest system holds out little potential for cutting public expenditures by reducing the size of government. The CFC and the district courts spend relatively few resources to resolve protest disputes. Eliminating their protest authority probably would not allow the government to reduce the workforce in these institutions, although it would permit the federal courts to allocate the small amounts of time now consumed by bid protests to other matters. Assuming that the standards for filing and resolving protests are left unchanged, the administrative savings from combining the operations of the GAO and the GSBCA also are likely to be negligible. The only approach for significantly reducing the number of government resources devoted to the resolution of protests is to fundamentally reduce the scope of protest oversight, a possibility discussed in more detail below. Forum consolidation, by itself, is an ineffectual path to this end.

Increased cost to private parties and the government of deciphering a fragmented protest dispute resolution system. Maintaining numerous dispute resolution venues increases the possibilities for confusion among offerors and government purchasing agencies as the multiple forums apply differing jurisdictional standards, use varying substantive standards, and generate inconsistent results. Uncertainties about the jurisdiction, powers, and decisionmaking preferences of each forum can cause public and private parties to expend resources to determine where protests should be brought and how they should be prosecuted and defended. The need to assess each protest possibility in light of the distinctive attributes of each protest forum appears to require private actors and public authorities to spend significant resources on legal counsel. An exact calculation of the amount of counseling resources resulting from forum multiplicity is problematic, but interviews with private and public participants in the protest system suggest that they are genuine and substantial.

Some costs of the existing dispute resolution structure could be reduced without forum consolidation. For example, Congress could eliminate a major source of counseling confusion by clarifying the jurisdiction of the CFC and the district courts over pre-award protests. Counseling expenses also could be diminished by statutory amendments that compelled all existing forums to apply the same standard and scope of review (although interpretational variations would be sure to continue, even if all forums were governed by the same nominal standard). Compared to these less sweeping alternatives, consolidation of protest authority would provide a more certain and effective way to reduce counseling costs.

Possibilities for aberrant reasoning and outcomes in forums that address protests infrequently. Forum multiplicity increases the possibility of aberrant decisionmaking — either in reasoning or outcomes — as judges on tribunals that infrequently address protest questions mishandle issues with which they have little familiarity. The concern about ill-informed reasoning or protest outcomes presumably would be greatest with the district courts, which, compared to the CFC, the GAO, and the GSBCA, address government procurement issues least frequently. However, there is no evidence suggesting that the district courts have displayed a propensity to make aberrant protest decisions or use questionable analytical methodologies.

E. Synthesis

As reflected in the Section 800 Committee's report, most proposals for consolidating protest resolution authority have focused on unifying the federal courts' protest authority in a single forum. A second significant proposal has been to establish a unified administrative forum that would combine features of the GAO and the GSBCA. A third possibility would be to divest the federal courts of all protest jurisdiction and to consolidate all protest authority in a single administrative tribunal. The discussion below considers approaches for consolidating the judicial and administrative protest venues, respectively. Because the desirability of consolidation reforms depends in part upon the value of protest oversight generally, it is also necessary to consider approaches for evaluating the effects of the protest system on the quality of government procurement.

1. The Consolidation of Judicial Protest Forums

As discussed above, there is no evidence indicating that a perceived need to compete with other forums to maintain (or increase) an existing share of protest cases has moved the CFC or the district courts to change their behavior in protest disputes. This contrasts with the shifts in GAO and GSBCA behavior caused by CICA's creation of rivalry between those forums.[111] Maintaining multiple judicial protest forums cannot be sustained on the ground that multiplicity has generated competition that improves performance. Thus, an assessment of judicial protest forum duplication must rest on other considerations, such as cost, convenience to litigants, comparative analytical advantage, and the availability of review by the GAO or the GSBCA.

The most frequently suggested measure for simplifying the existing structure of protest mechanisms has been to unify federal court protest jurisdiction in the CFC and withdraw such jurisdiction from the federal district courts. The case for consolidation in the CFC rests on four rationales: exploiting the superior CFC expertise in public procurement issues; simplifying post-award dispute administration; avoiding doctrinal inconsistency that could arise as numerous district courts and courts of appeals arrive at different interpretations of the procurement laws; and reducing overhead costs associated with applying bid protest jurisdiction in each forum.[112]

---

[111] *See supra* notes 101-08 and accompanying text.

The out-of-pocket savings that the CFC or the district courts would likely realize from an elimination of their protest jurisdiction are exceedingly small. This is particularly true for the district courts, which hear few protest cases each year. Two further objections might be raised against collapsing all federal court protest jurisdiction into the CFC. First, a comparison of bid protest opinions issued by, respectively, the district courts and the CFC does not suggest that the CFC has an analytical comparative advantage by virtue of its superior experience in government contract matters. Nor is there persuasive evidence suggesting that the Federal Circuit addresses bid protest or other government contract matters with greater skill than the other federal courts of appeals. The superior experience of the CFC and the Federal Circuit in addressing government contracts issues has not manifested itself in analytically superior results in protest disputes.

Second, district court jurisdiction affords easier access to protesters. To make the CFC as readily accessible to protesters as the district courts are today, the CFC's resources would have to be expanded substantially to permit the court to hold more proceedings outside Washington, D.C. However, the CFC has been taking steps to make its processes more accessible to parties located outside of Washington, D.C. A consolidation of judicial protest authority in the CFC might come at the expense of some loss of convenience for protesters, but the loss to protestors would be offset in part by the reduced cost to the government in defending protests outside of Washington, D.C.

As suggested above, consolidation is not obviously necessary to eliminate confusion about the respective pre- and post-award jurisdiction of the CFC and the district courts. A relatively simple legislative clarification of the authority of individual forums would be an appropriate and sufficient cure. Such a clarification would make clear that the federal district courts have power to issue pre-award relief, and would grant the CFC powers parallel to those of the district courts concerning post-award protests.[113] The chief logic for maintaining two judicial forums having the same jurisdiction and applying essentially the same standard of review would be to increase the accessibility of the protest mechanism to offerors.

---

[112] *See* Section 800 Committee, *supra* note 9; *see also* 55 *Fed. Cont. Rept. (BNA)* 731, 734 (May 20, 1991) (reporting Justice Department recommendation for consolidating judicial protest authority in the CFC; noting Justice Department view that "[t]here is no principled basis for this multiplicity of forums, and there is still confusion over the division" of authority between the CFC and the district courts).

[113] *See* Claybrook, *supra* note 43, at 20-24; Pachter, *supra* note 61, at 61; Villet, *supra* note 30, at 184-85.

On balance, there is little to recommend the maintenance of two judicial forums applying the same standard of review where it is apparent that the forums will not "compete" in ways that improve performance. Redundancy in that context serves mainly to increase vendor accessibility to the protest mechanism. However, consolidation that involved nothing more than transferring all federal court protest jurisdiction to the CFC would not necessarily yield net benefits unless there is some further increase in outlays to permit the CFC to hear matters effectively outside of Washington. Unless one is willing to impose on vendors the cost of prosecuting protests in Washington, additional CFC expenditures will be necessary.

The structuring of federal court protest jurisdiction could take paths other than simply collapsing the protest authority of the CFC and the district courts into a single federal court forum. An additional possibility is simply to eliminate the protest jurisdiction of the federal courts and to rely entirely on dispute resolution by the GAO and the GSBCA (particularly if the GSBCA's protest subject matter jurisdiction were to be expanded to encompass all federal procurement activity). The recognition by the federal courts of protest jurisdiction in cases such as *Heyer* and *Scanwell* took place at a time when a disappointed offeror's only recourse was to seek review before the GAO, whose examination of purchasing agency decisions was highly deferential and whose remedial power consisted solely of recommending adjustments in agency purchasing behavior. *Scanwell* in particular may have reflected a judicial view that intervention by the federal courts was necessary to cure weaknesses in the existing framework of administrative protest oversight. The development of the GSBCA as a source of more robust protest scrutiny, along with GAO's adoption of stronger information gathering tools and a less deferential attitude toward government buyers, has weakened the need for judicial oversight.

One path for protest forum simplification would be to expand the GSBCA's subject matter jurisdiction to make it equal to the GAO's, and to increase the ability of the GAO and the GSBCA to hear protest disputes throughout the country. By this approach, a protester's sole recourse would be through the administrative processes of the GAO or the GSBCA. Appeals from GSBCA decisions would still be taken to the Federal Circuit. The treatment of appeals from GAO decisions would complicate efforts to eliminate participation by the district courts and the CFC. These judicial forums currently are available to review GAO protest decisions. Perhaps the best solution would be to limit appeals from GAO decisions to the CFC, thus continuing a small, residual protest role for that court.

Two factors might weigh against eliminating the protest jurisdiction of the federal courts. One concern is that eliminating district court jurisdiction might impose an unacceptable burden on some litigants outside of Washington, D.C.

One solution for this concern would be to increase the ability of the GAO or the GSBCA to hear protest disputes outside of Washington. One might also simply tolerate this inconvenience. That the aggregate inconvenience is likely to be minimal is suggested by the paucity of filings each year in the district courts; the relative minor inconvenience to litigants would be overcome by the benefits from simplification.

A second factor is the possibility that judicial oversight yields a more neutral, objective review of high profile protests for which the judgment of the GAO and the GSBCA might be skewed by actual or perceived pressures from Congress or the President, respectively. The judiciary enjoys an important measure of independence from such pressures and therefore might provide a superior forum for resolving certain cases. It is difficult to point to many protest disputes (such as, perhaps, the Newport News protest of the Navy's award of the Seawolf development contract) for which this insulation from political pressure would be important for ensuring that the protester's complaint receives proper scrutiny. And judicial review (by the Federal Circuit) of GSBCA decisions provides a check against improper influence.

Concern about vesting all protest authority in bodies that are more responsive to political signals from Congress and the President is not frivolous and could be raised in favor of preserving a protest alternative in the federal courts. However, the risks associated with eliminating the role of the federal courts (except through appellate review of GSBCA decisions by the Federal Circuit, and review of GAO decisions through the CFC and the Federal Circuit) seem minor. Historically, the number of politically sensitive protests for which judicial oversight might be desirable has been especially rare. Second, a decision to eliminate federal court jurisdiction would not be irreversible. It would be possible to conduct a limited experiment to test the continuing usefulness of giving federal courts protest jurisdiction. One could use a sunset mechanism that withdrew the federal courts' jurisdiction for a finite period (say, five or ten years) and thereby required a congressional reassessment of the appropriateness of denying protesters recourse to the federal courts. It would be relatively simple to reinstate the protest jurisdiction of either the CFC or the district courts if experience showed that exclusive reliance on the GAO and the GSBCA proved to be unwise.

2. Consolidation of Administrative Forums

Competition between the GAO and the GSBCA has been a powerful stimulus for innovation in the administrative resolution of protests. Although there has been some convergence in the nominal legal standards that the GAO and the GSBCA use in protest disputes, there remain important possibilities for continuing procedural innovation and improvements in decisionmaking quality that competition between the two bodies can promote. The formation of a single, two-track administrative protest tribunal — featuring an austere protest path with little discovery and a more elaborate protest channel with comparatively full-blown discovery and trial-like procedures — would permit some reduction in government administrative costs, but such savings are unlikely to be substantial. The more important consequence would be to increase decisionmaking consistency and thereby reduce the costs incurred by private parties and government agencies to assess the probable outcome of a protest in two forums applying different standards. But these advantages seem outweighed by the benefits of preserving a creative tension between the two forums.

The experience to date with GAO and GSBCA rivalry suggests that it might be useful to expand the Board's protest authority to reach matters beyond computer and telecommunications procurements. There is no substantive rationale for conferring distinctive treatment on computer and communications procurements, and the elimination of this restriction on the GSBCA's powers would permit the benefits of forum rivalry to be realized for all protests, regardless of subject matter.

One other option involving administrative dispute resolution deserves mention here. All of the boards of contract appeals might be given bid protest jurisdiction for disputes arising within their agencies. Many existing board of contract appeals judges have expressed apprehension about such an approach, mainly out of concern that the boards might be assigned protest responsibilities without an increase in resources. If greater resources were provided, the boards presumably would find such an adjustment acceptable. If the boards received bid protest jurisdiction, there would be an initial period in which results and analytical techniques across the various boards might diverge. As has been the case with board jurisdiction over performance-related government contract claims, major inconsistencies among the boards would disappear over time through appellate oversight by the Federal Circuit.

3. The Underlying Policy Issue: Assessing the Value of Protest Oversight

The foregoing discussion and recommendations assume that a robust protest mechanism improves government procurement performance. Current debate over forum multiplicity obscures a more fundamental issue involving the bid protest process — namely, the correct standard of review that oversight tribunals (regardless of their number or location) should apply, and the remedies that the protest system should provide to disappointed sellers. The answers to these questions depend heavily on judgments about how skillfully government purchasing officials will exercise greater discretion if protest oversight is relaxed.

There is strikingly little empirical basis for answering the ultimate questions about protest oversight. Debate over the wisdom of the protest system has proceeded with little systematic effort to determine whether CICA and related protest reforms have improved the performance of government buyers. Filling this empirical void is essential to any sensible effort to determine the optimal content of the protest process. Several approaches would serve this end.

First, it would be extremely useful to conduct detailed studies of purchasing agency activity to determine the impact of modern protest reforms. Possible focal points for analysis would include:

a. A comparison of pre- and post-CICA behavior for major purchasing organizations to identify adjustments in agency behavior and procurement results, including the amount of resources dedicated to personnel training, source selection, and to defense of protests; the time required to purchase and field new goods and services; changes in the price/quality mix obtained by purchasing agencies; and the perceptions of users within the agency about the quality of what the agency has procured.

b. A detailed examination of major procurement episodes to determine how skillfully the GAO and the GSBCA have evaluated agency purchasing decisions.

c. A comparison between a major government purchasing organization and a major private company purchasing department to determine differences in the outcomes of efforts to buy comparable goods or services over time.

A second evaluation strategy involves experimenting with different levels of protest oversight. To assess the substantive impact of specific oversight mechanisms, it would be useful to permit an individual government purchasing agency (or selected agencies) to operate with austere protest controls (i.e., a permissive regulatory structure) and to evaluate the performance of such bodies over time.[114] For example, a selected government agency might be permitted to operate completely free from protest oversight — to operate with the same minimalist contract doctrines that control the exercise of discretion by private purchasing officials. This would permit a natural, side-by-side comparison of procurement regimes operating with and without extensive protest oversight.

A third component of efforts to assess the efficacy of protest reform is to collect and analyze data concerning the impact of any new adjustments of the protest system. Any legislative or regulatory changes in the protest process, or other ingredients of the procurement system, should include a requirement for *ex*

---

[114] The GSBCA's entry into the protest process was deliberately experimental, as CICA initially limited the Board's protest jurisdiction to three years. On the importance of experimentation in identifying promising paths for procurement reform, see Fred Thompson, *Deregulating Defense Acquisition*, 107 POL. SCI. Q. 727 (Winter 1992-1993).

post evaluation of the impact of the protest process on procurement outcomes.[115] Commentary that weighs the efficacy of the existing protest process often presents general evaluative assessments that have little evident basis other than the experience and intuition of the individual commentator.[116] Candidates for conducting the *ex post* evaluations include the Office of Federal Procurement Policy, the Administrative Conference of the United States, or another body that is not directly involved in conducting procurements.

IV. Summary of Recommendations

A. Consolidating the judicial protest authority now shared by the Court of Federal Claims and the district courts in a single forum would be desirable.

B. Although consolidation of the federal courts' protest jurisdiction in a single judicial forum would be beneficial, a more useful reform would be to eliminate the protest jurisdiction of the federal courts and rely entirely on oversight by the GAO and the GSBCA (assuming that the Board's subject matter jurisdiction were expanded to encompass all federal procurement). The modern development of the protest authority of the GAO and the GSBCA has severely attenuated the need for maintaining protest jurisdiction in the CFC or the district courts. The withholding of federal court protest jurisdiction could initially be limited to a five or ten-year period to require congressional reevaluation of the usefulness of such an adjustment.

C. Competition between the GAO and the GSBCA has stimulated fruitful innovation in the administrative disposition of protests. Creation of a single administrative protest forum would eliminate such competition and would be unwise. There is little basis for continuing to limit the GSBCA's protest jurisdiction to computer and telecommunications procurements.

D. Judgments about the administration of the protest process ultimately may depend on one's assessment about whether weak or robust protest processes best serve the interests of taxpayers. There has been little systematic study about whether the protest system in the past decade has improved the quality or reduced the cost of public procurement. Empirical testing of the effect of the protest process, including the use of experiments with austere protest oversight, is essential to illuminate choices about protest institutional design.

---

[115] *See* Gary P. Quigley & Catherine S. Drost, *Defense Contractor Use of Preaward and Postaward Dispute Forums*, 20 PUB. CONT. L.J. 188, 196 (1991). Congress occasionally has recognized the usefulness of *ex post* empirical evaluations in making procurement policy choices. The legislative history of the FCIA stated that Congress would review the wisdom of granting pre-award protest authority to the CFC once the CFC had compiled a record in the area. *See* H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 43 (1981).

[116] *See, e.g.*, Thomas Papson, *Bid-Protest System Under Scrutiny*, LEGAL TIMES, Dec. 20, 1993, at 24:

> Why should disappointed bidders for government contracts have substantially greater rights than their commercial counterparts? Because a strong and effective bid-protest system does in fact protect the public fisc, foster full and open competition, and deter violations of the laws and regulations governing the federal procurement process.

References

Acquisition Law Advisory Panel. *Streamlining Defense Acquisition Laws,* U.S. Department of Defense (1993).

Allen, Douglas W., and Dean Lueck. *The 'Back Forty' on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts,* JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 8: 366 (1992).

Allen, Rand L., and Joseph L. Gildea. *Complying with FASA: A Comprehensive Guide to the Federal Acquisition Streamlining Act.* (1995) Vienna, Va.: Holbrook & Kellogg.

American Bar Association, Section of Public Contract Law. *Report of the American Bar Association Public Contract Law Section Bid Protest Committee Courts Subcommittee Project* (1991).

American Bar Association, Section of Public Contract Law. *The Protest Experience Under the Competition in Contracting Act* (1989).

Brittan, Alexander J. *The Comptroller General's Dual Statutory Authority to Decide Bid Protests.* PUBLIC CONTRACT LAW JOURNAL 22: 636 (1993).

Burnett, William B., and William E. Kovacic. *Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual-Sourcing,* YALE JOURNAL ON REGULATION 6: 249 (1989).

Cabral, Luis, and Shane Greenstein. *Switching Costs and Bidding Parity in Government Procurement of Computer Systems.*" JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 6: 453 (1990).

Cibinic, John, Jr., and Jesse E. Laskin. *The Comptroller General and Government Contracts. George Washington University Law Review* 38: 349 (1970).

Cibinic, John, Jr., and Ralph Nash, Jr. FORMATION OF GOVERNMENT CONTRACTS. 2d Edition. Washington, D.C.: George Washington University (1986).

Cibinic, John, Jr., and Ralph Nash, Jr. I FEDERAL PROCUREMENT LAW: CONTRACT FORMATION. Washington, D.C.: George Washington University (1977).

Claybrook, Frederick W., Jr. *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment.* PUBLIC CONTRACT LAW JOURNAL 21: 1 (1992).

Coburn, George M. *The New Bid Protest Remedies Created by the Competition in Contracting Act of 1984.* NATIONAL CONTRACT MANAGEMENT JOURNAL 19: 47 (1985).

Coffee, John C., Jr. *Competition versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation.* THE BUSINESS LAWYER 50: 1 (1995).

Cohen, David M. *Claims for Money in the Claims Court*, CATHOLIC UNIVERSITY LAW REVIEW 40: 533 (1991).

Cohen, William S. *Computer Chaos: Billions Wasted Buying Federal Computer Systems.* Mimeo (1994).

Commission on Government Procurement. *Report of the Commission on Government Procurement.* Washington, D.C.: U.S. Government Printing Office (1972).

Cooter, Robert D. "Market Modernization of Law." Mimeo (April 1995).

Daniels, Stephen M. *New Directions for the General Services Board of Contract Appeals. Public Contract Newsletter* 28(3): 3 (Spring, 1993).

Farnsworth, E. Allan. *Precontractual Liability and Preliminary Agreements.* COLUMBIA LAW REVIEW 87: 217 (1987).

Feidelman, Joel R., and Josephine L. Ursini. *Contract Formation Jurisdiction of the United States Claims Court.* CLEVELAND STATE LAW REVIEW 32: 41 (1983).

Feldman, Steven W. *Interim Suspension Authority of the General Services Board of Contract Appeals in Automatic Data Processing Protests: Legal and Practical Considerations.* PUBLIC CONTRACT LAW JOURNAL 17: 1 (1987).

Gabig, Jerome S. *A Primer on Federal Information Systems Acquisitions: First Part of a Two-Part Article.* PUBLIC CONTRACT LAW JOURNAL 17: 31 (1987).

Goetz, Charles J., and Robert E. Scott. *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Experimental Model and a Theory of Efficient Breach.* COLUMBIA LAW REVIEW 77: 554 (1977).

Goldberg, Victor P. *Relational Exchange: Economics and Complex Contracts.* AMERICAN BEHAVIORAL SCIENTIST 23: 337 (1980).

Greenstein, Shane M. *Did Installed Base Give an Incumbent Any (Measurable) Advantages in Federal Computer Procurement?* RAND JOURNAL OF ECONOMICS 24: 19 (1993).

Greenstein, Shane M. *Procedural Rules and Procurement Regulations: Complexity Creates Tradeoffs.* JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 9: 159 (1993).

Gump, Thomas K. *Rationalizing the Procurement Dispute Process.* THE FEDERAL LAWYER 42: 20 (1995).

Higgins, Richard S., William F. Shughart II, and Robert D. Tollison. *Dual Enforcement of the Antitrust Laws* in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION, edited by Robert J. Mackay, James C. Miller III, and Bruce Yandle. Stanford: Hoover Institution (1987).

Hordell, Michael A., and Eric L. Lipman. *The Rise and Use of Protective Orders at the General Services Board of Contract Appeals.* PUBLIC CONTRACT LAW JOURNAL 20: 22 (1990).

Horton, Frank. "Speech to the Computer and Communications Industry Association." Mimeo (Dec. 13, 1984).

Kannan, Phillip M. *Perkins v. Lukens Steel Company: Fifty-two and Counting.* PUBLIC CONTRACT LAW JOURNAL 22: 463 (1993).

Kannan, Phillip M. *Jurisdiction of District Courts in Cases Involving Government Contracts.* PUBLIC CONTRACT LAW JOURNAL 21: 416 (1992).

Kelman, Steven. PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE. Washington, D.C.: AEI Press (1990).

Keyes, W. Noel. *Government Contracts in a Nutshell.* St. Paul, MN: West Publishing Co. (1990).

Kovacic, William E. *Regulatory Controls as Barriers to Entry in Government Procurement.* POLICY SCIENCES 25: 29 (1992).

Kovacic, William E. *The Sorcerer's Apprentice: Public Regulation of the Weapons Acquisition Process* in ARMS, POLITICS, AND THE ECONOMY: HISTORICAL AND CONTEMPORARY PERSPECTIVES, edited by Robert Higgs. New York: Holmes & Meier (1990).

Kovacic, William E. *Illegal Agreements with Competitors.* ANTITRUST LAW JOURNAL 57: 517 (1988).

Laffont, Jean-Jacques, and Jean Tirole. A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION. Cambridge, MA: MIT Press (1993).

Leventhal, Harold. *Public Contracts and Administrative Law.* AMERICAN BAR ASSOCIATION JOURNAL 52: 35 (1966).

Lieberman, Richard D. "Scorekeeping Bid Protests in Six Forums." *Federal Contracts Report (Special Supplement)* 63(7): 1 (Feb. 27, 1995).

Lipman, Eric L., and James M. Read. *Summer to Summer: Recent Government Contracts Cases before the United States Claims Court.* PUBLIC CONTRACT LAW JOURNAL 22: 1 (1992).

Lloyd, Robert E. *Efficiency, Justice, and Rent-seeking in Federal Contract Dispute Resolution* in CONFLICT RESOLUTION AND PUBLIC POLICY, edited by Miriam K. Mills. New York: Greenwood Press (1992).

Macauley, Stewart. *Non-Contractual Relations in Business: A Preliminary Study.* AMERICAN SOCIOLOGICAL REVIEW 28: 55 (1963).

Marshall, Robert, Michael J. Meurer, and Jean-Francois Richard. *Curbing Agency Problems in the Procurement Process by Protest Oversight.* RAND JOURNAL OF ECONOMICS 25: 297 (1994a).

Marshall, Robert, Michael J. Meurer, and Jean-Francois Richard. *Litigation Settlement and Collusion.* QUARTERLY JOURNAL OF ECONOMICS 109: 213 (1994b).

Marshall, Robert, Michael J. Meurer, and Jean-Francois Richard. *Multiple Litigants with a Public Good Remedy.* RESEARCH IN LAW AND ECONOMICS 16: 151 (1994c).

Marshall, Robert, Michael J. Meurer, and Jean-Francois Richard. *Incentive-Based Procurement Oversight by Protest* in INCENTIVES IN PROCUREMENT

CONTRACTING, edited by Jim Leitzel and Jean Tirole. Boulder, CO: Westview Press (1993).

Marshall, Robert, Michael J. Meurer, and Jean-Francois Richard. *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest.* HOFSTRA LAW REVIEW 20: 1 (1991).

McCubbins, Mathew M., Roger G. Noll, and Barry R. Weingast. *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control of Agencies.* VIRGINIA LAW REVIEW 75: 431 (1989).

McCubbins, Mathew M., Roger G. Noll, and Barry R. Weingast. *Administrative Procedures as Instruments of Political Control.* JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 3: 243 (1987).

McNaugher, Thomas L. NEW WEAPONS, OLD POLITICS: AMERICA'S MILITARY PROCUREMENT MUDDLE. Washington, D.C.: Brookings Institution (1989).

Miller, Philip R. *The New United States Claims Court.* CLEVELAND STATE LAW REVIEW 32: 7 (1983).

Miller, Arthur S., and W. Theodore Pierson, Jr. *Observations on the Consistency of Federal Procurement Policies With Other Governmental Policies.* LAW & CONTEMPORARY PROBLEMS 29: 277 (1964).

Nagle, James F. A HISTORY OF GOVERNMENT CONTRACTING. Washington, D.C.: George Washington University (1992).

National Performance Review. *Creating a Government That Works Better & Costs Less.* Washington, D.C. (1993).

Pachter, John S. *The Need for a Comprehensive Judicial Remedy for Bid Protests.* PUBLIC CONTRACT LAW JOURNAL 16: 47 (1986).

Papson, Thomas. *Bid-Protest System Under Scrutiny.* LEGAL TIMES: 24 (December 20, 1993).

Peterson, Frank K. *In-House Counsel and Protective Orders in Bid Protests.* PUBLIC CONTRACT LAW JOURNAL 21: 53 (1991).

Posner, Richard A. ECONOMIC ANALYSIS OF LAW. Boston: Little, Brown (1992).

President's Blue Ribbon Commission on Defense Management. *A Quest for Excellence: Final Report to the President by the President's Blue Ribbon Commission on Defense Management.* Washington, D.C. (1986).

Quigley, Gary P., and Catherine S. Drost. *Defense Contractor Use of Preaward and Postaward Dispute Forums.* PUBLIC CONTRACT LAW JOURNAL 20: 188 (1991).

Riordan, Mark A. *Federal Court Actions Challenging Agency Overrides of the CICA Stay.* PUBLIC CONTRACT LAW JOURNAL 23: 397 (1994).

Rogerson, William P. *Economic Incentives and the Defense Procurement Process.* JOURNAL OF ECONOMIC PERSPECTIVES 8: 65 (1994).

Rogerson, William P. *Quantity versus Quality in Military Procurement.* AMERICAN ECONOMIC REVIEW 80: 83 (1990).

Stover, Carl F. *The Government Contract System As A Problem in Public Policy.*" GEORGE WASHINGTON UNIVERSITY LAW REVIEW 32: 701 (1964).

Sumison, Steven R. *Injunctive Relief in the United States Claims Court: Does a Bid Protester Have Standing?*" BRIGHAM YOUNG UNIVERSITY LAW REVIEW 85: 803 (1985).

Thompson, Fred. *Deregulating Defense Acquisition.* POLITICAL SCIENCE QUARTERLY 107: 727 (Winter 1992-1993).

Thomaszczuk, Alex D., and John E. Jensen. *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack by the Department of Justice.*" HARVARD JOURNAL ON LEGISLATION 29: 399 (1992).

Villet, Jeffrey M. *Equitable Jurisdiction in Government Contract 'Bid Protest' Cases: Discerning the Bounds of Equity.* PUBLIC CONTRACT LAW JOURNAL 17: 152 (1987).

Webber, Richard J. *Bid Protests and Agency Discretion: Where and Why do the GSBCA and GAO Part Company?* PUBLIC CONTRACT LAW JOURNAL 18: 1 (1988).

Whelan, John W. UNDERSTANDING FEDERAL GOVERNMENT CONTRACTS. Chicago: Commerce Clearing House (1993).

Whelan, John W. *Law of Public Administration: Need for Legal Study.* GEORGETOWN LAW JOURNAL 53: 953 (1965).

Whelan, John W., and J.T. Phillips. *Government Contracts: Emphasis on Government.* LAW & CONTEMPORARY PROBLEMS 29: 315 (1964).

Wiecek, William M. *The Origin of the United States Court of Claims.* ADMINISTRATIVE LAW REVIEW 20: 387 (1968).

Report for Recommendation 95-6

The Freedom of Information Act and Confidentiality under the Administrative Dispute Resolution Act

Mark H. Grunewald
Associate Dean and Professor of Law
Washington and Lee University
School of Law

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

I. BACKGROUND—ADMINISTRATIVE CONFERENCE RECOMMENDATION 88-11 AND THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1990 561

II. THE ADMINISTRATIVE DISPUTE RESOLUTION ACT AND THE FREEDOM OF INFORMATION ACT 564

III. FOIA AND CONFIDENTIALITY UNDER THE ADRA: THE TRUMPING EFFECT 568

IV. FOIA TRUMPING OF ADRA CONFIDENTIALITY: THE CHILLING EFFECT 572

V. FULFILLING THE GOALS OF FEDERAL ADR 574

VI. CONCLUSION 576

RECOMMENDATION 577

APPENDIX 578

I. Background—Administrative Conference Recommendation 88-11 and the Administrative Dispute Resolution Act of 1990

In the 1980s, the Administrative Conference of the United States (ACUS) adopted a series of recommendations to regularize and promote the use of alternative means for resolving disputes in federal administrative agency practice.[1] The work of the Conference recognized that wider use of informal methods of dispute resolution would require both public and participant confidence in the efficiency and fairness of such processes. A central goal in developing this confidence was assuring that participants would have a hospitable and trustworthy forum in which to undertake to settle administrative disputes and that the public would have a sufficiently visible and accountable mechanism to meet accepted standards of openness in government.

In 1988, in furtherance of this goal, the Administrative Conference recommended a substantial measure of confidentiality for parties and neutrals in alternative dispute resolution proceedings, particularly mediation. This recommendation sought to "encourage the use of alternative means of dispute resolution by appropriate protection to communications between parties and neutrals in settlement negotiations."[2] It recognized that "a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements."[3] The recommendation was based upon a report to the Conference by Philip J. Harter, entitled, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements By Ensuring Mediator Confidentiality.*[4] (Hereinafter *Harter Report*) This report surveyed the legal and policy issues surrounding confidentiality in mediation and concluded that while existing law provided some confidentiality protection, there were gaps and uncertainties that left the mediation process without the degree of protection necessary to encourage its use.

---

[1] Administrative Conference of the U.S., Recommendation 89-2, *Contracting Officers' Management of Disputes*, 1 CFR §305.89-2 (1992); Administrative Conference of the U.S., Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, 1 CFR §305.88-11 (1992); Administrative Conference of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges,* 1 CFR §305.88-5 (1992); Administrative Conference of the U.S., Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 1 CFR §305.87-11 (1992); Administrative Conference of the U.S., Recommendation 87-9, *Dispute Procedures in Federal Debt Collection,* 1 CFR §305.87-9 (1992); Administrative Conference of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 1 CFR §305.87-5 (1992); Administrative Conference of the U.S., Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution,* 1 CFR §305.86-8 (1992); Administrative Conference of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication,* 1 CFR §305.86-7 (1992); Administrative Conference of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3 (1992); Administrative Conference of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 1 CFR §305.86-1 (1992); Administrative Conference of the U.S., Recommendation 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government,* 1 CFR §305.84-7 (1992); Administrative Conference of the U.S., Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA,* 1 CFR §305.84-4 (1992); Administrative Conference of the U.S., Recommendation 90-2, *The Ombudsman in Federal Agencies,* 1 CFR §305.90-2 (1992); Administrative Conference of the U.S., Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 CFR §305.82-2 (1992).

[2] 1 CFR 305.88-11.

The Conference recommendation became the basis for the confidentiality section of the Administrative Dispute Resolution Act of 1990 (ADRA).[5] This section of the Act provides detailed standards aimed at striking a balance between the need for confidentiality in alternative dispute resolution and principles of openness in government. Subsections (a) and (b) of section 574 extend confidentiality to any "dispute resolution communication,"[6] except in specified circumstances. A dispute resolution communication is defined as:

> any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.[7]

Under subsection (a), a dispute resolution communication in the hands of a neutral is confidential unless:

> (1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;
>
> (2) the dispute resolution communication has already been made public;

---

[3] *Id.*

[4] Harter, Philip J., *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, Report to the Administrative Conference of the U.S., 1988 ACUS 839, *reprinted in* 1 ADMIN. L.J. 315 (1989).

[5] 5 USC 571 et seq. (1994).

[6] 5 USC 571 (5) (1994).

[7] *Id.*

> (3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or
>
> (4) a court determines that such testimony or disclosure is necessary to—
>
> > (A) prevent a manifest injustice;
> >
> > (B) help establish a violation of law; or
> >
> > (C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.[8]

Under subsection (b), a dispute resolution communication in the hands of a party is confidential unless:

> (1) the communication was prepared by the party seeking disclosure;
>
> (2) all parties to the dispute resolution proceeding consent in writing;
>
> (3) the dispute resolution communication has already been made public;
>
> (4) the dispute resolution communication is required by statute to be made public;
>
> (5) a court determines that such testimony or disclosure is necessary to—
>
> > (A) prevent a manifest injustice;
> >
> > (B) help establish a violation of law; or
> >
> > (C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;[9]

Any dispute resolution communication that is disclosed in violation of subsection (a) or (b) is made inadmissible in any proceeding relating to the issues in controversy with respect to which the communication was made.[10] Parties are permitted to agree upon alternative confidentiality procedures.[11] A neutral is required to give notice to parties of any demands for disclosure made upon the neutral by way of discovery request or other legal process.[12] Otherwise discoverable evidence is not protected merely because it was presented in the course of a dispute resolution proceeding.[13] The confidentiality protection has no effect on the information and data necessary that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.[14] The confidentiality protection does not prevent the gathering of information for research or educational purposes, so long as the parties and the specific issues in controversy are not identified.[15] The confidentiality protection does not prevent the use of a dispute resolution communication to resolve a dispute between the neutral and a party or participant.[16]

---

[8] 5 USC 574(a).

[9] 5 USC 574(b).

Taken as a whole, section 574 reflects attention to practical considerations involved in the sharing of information for the purpose of settling disputes as well as public policy considerations based in the possible need for information critical to the legal system or the public health and safety. The detail of the section and the careful balance it strikes suggest a legislative effort to resolve comprehensively the appropriate level of confidentiality for alternative dispute resolution proceedings. In the final stages of consideration of the bill of which the confidentiality section was a part, however, a question arose as to the effect of the confidentiality proposal on the availability of records under the Freedom of Information Act.

II. The Administrative Dispute Resolution Act and the Freedom of Information Act

The question of the relationship between the confidentiality provision of the Administrative Dispute Resolution bill and the Freedom of Information Act arose late in the legislative process and the compromise reached at that late stage was intended to be an interim solution only. The bill that became the Administrative Dispute Resolution Act had been introduced in 1989 by Senator Charles Grassley.[17] The comparable House version had been introduced by Congressmen Glickman and

---

[10] 5 USC 574(c).
[11] 5 USC 574(d).
[12] 5 USC 574(e).
[13] 5 USC 574(f).
[14] 5 USC 574(g).
[15] 5 USC 574(h).
[16] 5 USC 574(i).
[17] S.971; 135 Cong. Rec. S5166 (daily ed. May 11, 1989).

Pease in the same year.[18] The House bill was the subject of hearings by the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary. That bill was reported by the Committee on the Judiciary on June 1, 1990 and was passed in the House by voice vote on June 5, 1990.[19] The Senate bill was the subject of hearings by the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs. That bill was reported to the Senate floor by the Committee on Governmental Affairs on October 19, 1990.[20]

On the floor several amendments were made, including the addition to the confidentiality section of a final subsection, (j), which provided:

> This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title [exemption 3 of the Freedom of Information Act].

This amendment was proposed by Senator Patrick Leahy. Thereafter, the following colloquy occurred on the floor:

> Mr. LEVIN (floor manager of the bill):…[T]here has been some concern and some confusion about the extent to which documents used in and prepared for ADR proceedings are to be kept confidential…. Senator Leahy's amendment…explicitly provides that nothing in this bill is intended to create a (b)(3) exemption under the Freedom of Information Act [FOIA]. That means that any documents involved in a dispute resolution proceeding would be available to the public from a Federal agency to the extent it is permitted under FOIA.
>
> Mr. GRASSLEY: Will the Senator yield?
>
> Mr. LEVIN: I will be happy to yield to the Senator from Iowa and the sponsor of this bill.
>
> Mr. GRASSLEY: Although we have agreed to incorporate these amendments in the bill at this time, I am concerned that this is not the best approach when it comes to mediation, and I hope we will revisit the issue early next year. One of the keys to making ADR proceedings—particularly mediation—attractive and effective is the ability of the parties to

---

[18] H.R. 2497; 135 Cong. Rec. H2206 (daily ed. May 25, 1989).

[19] *See* H.R. Rep. No. 101-153, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. H3152 (daily ed. June 5, 1990).

[20] *See* S.Rep. No. 1005, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S18082-18091 (daily ed. Oct. 24, 1990).

be candid with the neutral in an effort to achieve settlement. That candor requires in proceedings like mediation the expectation of confidentiality with respect to the communications prepared for the purpose of the ADR proceeding and given to the neutral in confidence. The provisions in the bill as amended do not, in my opinion, sufficiently address that need for confidentiality.

Mr. LEAHY: Will the Senator yield?

Mr. GRASSLEY: I would be happy to yield to the Senator from Vermont.

Mr. LEAHY: Our staffs have discussed the confidentiality issues involving this bill to some extent over the last few days, but those discussions did not resolve all of the issues. As chairman of the Judiciary subcommittee with jurisdiction over the Freedom of Information Act, I was unwilling to carve out an exception in this bill from FOIA requirements in the final days of this Congress. I think such a step requires more deliberation. I can pledge, however, to the sponsor of this bill, Senator Grassley, that I will be happy to work with him next year on this issue and try to determine whether certain dispute resolution communications should be exempt from FOIA.

Mr. GRASSLEY: I thank the Senator from Vermont and look forward to working with him on this matter next year. I yield the floor.

Mr. LEVIN: Mr. President, I am pleased that we were able, for the purposes of passing this bill this year and getting the ADR process rolling, to temporarily resolve the confidentiality issue. As the Administrative Conference of the United States wrote in its recommendation on this subject, * * * since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements.

The provisions in this bill, as amended, do not as yet achieve that balance, and I am pleased that Senators Grassley and Leahy have agreed to address this issue more completely next year.[21]

---

[21] 136 Cong. Rec. at S18088 (daily ed. Oct. 24, 1990).

The bill as amended passed in the Senate by voice vote on October 25, 1990.[22] The House passed the Senate version of the bill on October 26, 1990 and the President signed the bill into law on November 15, 1990.

Without the Leahy amendment, the confidentiality section would, in all likelihood, have been construed to be a statute within the meaning of subsection (b)(3) of the Freedom of Information Act, which provides an exemption from mandatory disclosure of agency records:

> specifically exempted from disclosure by statute (other than section 552(b), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[23]

The confidentiality section of the ADRA establishes standards which appear to be "particular criteria for withholding" within the meaning of subpart (B) of Exemption 3.[24] In the words of the D.C. Circuit:

> a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose in the actual words of the statute (or at least in the legislative history of FOIA)—not in the legislative history of the claimed withholding statute, nor in the agencies interpretation of the statute.[25]

While it is not entirely clear that prior to the discussions which led to the addition of subsection (j) the proponents of the bill had assumed that the confidentiality section would be deemed an Exemption 3 statute, there is no indication in the legislative history that any exceptions to confidentiality other than those specified in the bill was to be given effect.

In fact, with the exception of subsection (j), the enacted confidentiality section of the ADRA consisted of a detailed set of standards reflecting generally the balance proposed in Recommendation 88-11. It was limited to communications prepared for the purposes of a dispute resolution proceeding. It did not cover the agreement to enter into a dispute resolution proceeding or the agreement or award reached as a result of a dispute resolution proceeding. It did not prevent the discovery or admissibility of otherwise discoverable evidence merely because the evidence was presented in a dispute resolution proceeding. It did not have any effect on the use of a dispute resolution communication necessary to document an agreement reached or order issued in a dispute resolution proceeding. It did not prevent the use of a dispute resolution communication necessary to resolve a dispute between a party and a neutral. It permitted disclosure of a dispute resolution communication where all parties to the proceeding consented, where the communication had already been made public or is required by statute to be made public, or where a court determined disclosure is necessary to prevent a manifest injustice, to help establish a violation of law, or to prevent harm to the public health and safety sufficient to justify disclosure. Subsection (j), however, imported into the confidentiality analysis generalized standards for public access not specifically tailored to the needs and objectives of ADR.

---

[22] *Id.* at 18091.

[23] 5 USC 552(b)(3).

[24] *See* Reporters Committee for Freedom of the Press v. Dept of Justice, 816 F.2d 730, 734-36 (D.C. Cir.), *rev'd on other grounds*, 489 U.S. 749 (1989).

[25] 816 F.2d at 735.

Thus, federal agencies began their experiment with new authority to engage in alternative dispute resolution under the ADRA with the issue of confidentiality addressed, but with an unusual twist: a claim for access to a dispute resolution communication, properly framed as a request for an agency record under FOIA, could trump the confidentiality protection of the ADRA.

III. FOIA and Confidentiality Under the ADRA: The Trumping Effect

To evaluate the significance of the trumping effect of FOIA on the confidentiality section of the ADRA, 5 USC 574, it is necessary first to understand how dispute resolution communications may become subject to FOIA disclosure. Only "agency records" are governed by FOIA.[26]..Dispute resolution communications that are not or do not become agency records cannot be obtained under FOIA. Four general categories of dispute resolution communications may, however, be agency records. First, dispute resolution communications prepared by an agency as a party in an ADR proceeding normally become agency records. Second, dispute resolution communications prepared by a party or nonparty participant in an ADR proceeding which are given to an agency and made a part of the agency's files normally become agency records. Third, dispute resolution communications submitted by any party or participant (including a government party or participant) to a neutral who is a government employee (or in some instances a non-employee who works under the control of an agency) and retained by the neutral normally become agency records. Fourth, dispute resolution communications prepared by a neutral who is a government employee (or again in some instances a non-employee) and retained by the neutral normally become agency records. Dispute resolution communications outside these four categories would not ordinarily become agency records and would thus not be subject to FOIA. Their confidentiality would be governed by the terms of section 574. Nevertheless, the four subject categories include a wide range of dispute resolution communications that are common across many agency ADR programs.

---

[26] 5 USC 552(f).

If a dispute resolution communication is an agency record, the next question is whether one of the nine FOIA exemptions applies, thus removing the record from the mandatory disclosure requirement. Despite strong policy arguments that generally favor confidentiality to promote settlement, FOIA does not itself contain an exemption, as such, for records of settlement discussion.[27] Nevertheless, several exemptions may apply to dispute resolution communications that might for one of the reasons noted above become agency records. The most commonly applicable exemptions would be: Exemption 4 for "trade secrets or commercial or financial information obtained from a person and privileged or confidential;"[28] Exemption 5 for "interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency;"[29] and Exemption 6 for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[30] For certain agency missions, one of the more specialized exemptions may be applicable, such as Exemption 8 for matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.[31] While each of these exemptions protect important interests, none does so with specific regard to the values at stake in advancing ADR. Moreover, FOIA law is itself complex and voluminous, and both within and without the government, FOIA expertise is rarely found in combination with ADR expertise. Traps for the unwary abound. Portions of records may be exempt, but reasonably segregable non-exempt portions are subject to mandatory disclosure.[32] It may even be difficult to anticipate meaningfully at the point ADR is being considered for use what types of information will be communicated in the process. Even if one expects growing judicial interest in ADR to lead courts to consider more generous construction of FOIA exemptions where the successful functioning of an alternative proceeding is at stake, the prospect for change alone would be small comfort to potential users of ADR who must undertake an alternative process under existing law, which particularly in view of subsection (j) gives courts little room to exercise discretion.[33]

---

[27] *See* Center for Auto Safety v. Dept. of Justice, 576 F.Supp. 739 (D.D.C. 1983).

[28] 5 USC 552(b)(4).

[29] 5 USC 552(b)(5).

[30] 5 USC 552(b)(6).

[31] 5 USC 552(b)(8).

[32] 5 USC 552(b) (final sentence).

[33] The First Circuit noted in rejecting the assertion of a settlement privilege under Exemption 5:

A central rationale for the confidentiality protection of section 574 was, in fact, the incomplete or uncertain application of existing common law and statutory protection for settlement discussions. The *Harter Report* contains an excellent summary of the possible common law and statutory bases for protecting mediation confidentiality as well as the policy arguments surrounding those protections. These bases for protection all represent departures, of varying degree, from the principle that the "public is entitled to every person's evidence."[34] The most important departures are: (1) the common law, relevancy-based, privilege for settlement negotiations,[35] (2) the settlement-promoting inadmissibility principle of Federal Rule of Evidence 408,[36] and (3) the *Hickman v. Taylor* "workproduct" exception to discovery.[37] These protections (and the FOIA exemptions as well) do not represent complete confidentiality protection for dispute resolution communications and, even where arguably applicable, leave considerable uncertainty. Partly in recognition of this uncertainty, there is also, as the *Harter Report* notes, growing movement for recognition of a separate "mediation privilege" either as a matter of common law development or more typically by statute.[38]

Interestingly, a number of these privileges have been argued to be, and in some cases have been recognized as being, incorporated by one or more of the FOIA

> We are sympathetic to the logic and force of this policy plea. The government engages in a prodigious amount of litigation as both plaintiff and defendant. Negotiated settlement is the most efficient means to terminate such disputes. Knowledge that written settlement communications will be available to anyone irrespective of his or her need to know inevitably will to some extent impede this means.
>
> Nonetheless the FOIA's legislative history "emphasize(d) that the law "is not a withholding statute but a disclosure statute…." The purpose of the legislation was to "eliminate" vague statutory phrases that agencies had previously used as "loopholes" for withholding information and "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language…." Consequently courts have repeatedly stated that uncertainties in the FOIA's language are to be construed in favor of disclosure and that its exemptions are to be read narrowly.
>
> * * *
>
> We therefore feel particularly constrained to require that sound policy arguments, however appealing, be grounded in a reading of the statutory language….

County of Madison v. Dept. of Justice, 641 F.2d at 1040.

[34] 8 Wigmore, Evidence, §2191-92, 2285 (McNaughton rev. 1961).

[35] *Harter Report* at 10.

[36] *Id* at 10-13.

[37] *Id* at 13-16.

[38] *Id* at 20-25. *Also compare* Lawrence R. Freeman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986) *with* Eric D. Green, *A Heretical View of a Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

exemptions.[39] In these instances, the argument is that through the particular exemption Congress intended, among other things, to recognize an existing legal privilege, at least when the agency records at issue meet the threshold standard for the exemption. For example, Exemption 5, as a threshold matter covers "interagency or intra-agency" memoranda, and has been held to incorporate a broad range of statutory and common law privileges.[40] Thus where interagency or intra-agency memoranda are at issue, these privileges apply through the exemption. The argument that agency records in the form of written settlement communications made to a neutral or to a party should be viewed as interagency memoranda so as to trigger the privilege-incorporating effect of Exemption 5 has been squarely rejected.[41] On the other hand, where settlement communications exchanged between an agency and a private party contained "commercial or financial" information—the threshold standard for Exemption 4—at least one court treated information as exempt, in effect giving recognition to a settlement privilege even though the "interagency memoranda" threshold of Exemption 5 could not be met.[42] The confidentiality section of the ADRA provides fresh and explicit congressional recognition of the importance of confidentiality to settlement efforts. This recognition could in turn be argued to warrant application of the policy of section 574 through an exemption where the threshold for the exemption was otherwise met. Ironically, the inclusion of subsection (j) of section 574 makes this construction of FOIA exemptions less likely, thereby possibly exposing dispute resolution communications to less protection under FOIA than other records for which the basis for exemption is, in effect, external common law or statute.

If section 574 were treated as an Exemption 3 statute, the trumping effect of FOIA for dispute resolution communication would be eliminated. The need for balance between openness and confidentiality would be determined under the ADRA. This is not to say that there would not remain substantial issues regarding confidentiality of dispute resolution communications, but these would be resolved by reference to section 574 itself and not to FOIA exemptions. In some cases this might require judicial refinement of the apparent balance struck between openness and confidentiality under section 574. That, however, would be a more focused and likely more productive inquiry for advancing the use of alternative dispute resolution than can be had under the analysis required by using existing FOIA exemptions.

---

[39] This is the case most clearly with Exemption 5. *See* United States v. Weber Aircraft Corp., 465 U.S. 792 (1984). There is limited authority for the same approach under Exemption 4. M/A-COM Information Sys. v. HHS, 656 F.Supp. 691, 692 (D.D.C. 1986). These courts have, however, recognized the awkwardness of this result as a matter of policy. Moreover, none took account of the modest trend toward the explicit recognition of a settlement privilege. *See e.g.*, Olin Corp. v. Insurance Co. of N. America, 603 F.Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982).

[40] 465 U.S. at 800.

[41] County of Madison v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981); Center for Auto Safety v. Department of Justice, 576 F.Supp. 739 (D.D.C. 1983).

[42] *See* M/A COM Information Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986); NAACP Legal Defense & Educ. Fund, Inc., v. Dept. of Justice, 612 F. Supp. 1143, 1145-46 (D.D.C. 1985).

IV. FOIA Trumping of ADRA Confidentiality: The Chilling Effect

In the roughly four years that the Administrative Dispute Resolution Act has been effective, there have been no officially reported legal challenges to confidentiality in federal ADR proceedings. In fact, section 574 has not been the subject of any reported litigation. Similarly, there are no reported post-ADRA cases in which the Freedom of Information Act has been used as the basis for seeking access to dispute resolution communications. The surface calm, however, presents a misleading picture of the significance of FOIA for ADRA confidentiality.

The use of ADR in federal administrative dispute resolution has grown rapidly since 1990, but remains in a relatively early stage of development. While there are many incentives for using ADR, among some agency officials and regulated parties, uncertainty as to the legal or practical effects of using alternative processes appears to deter broader experimentation. In fact, the very premise of Recommendation 88-11, and the central thesis of the *Harter Report*, was that without assurance of a substantial measure of confidentiality parties would be reluctant to participate fully in ADR.[43] How then, can one account for the apparent absence of cases contesting confidentiality in federal ADR and the growth of ADR use in the face of the trumping effect of FOIA on section 574 confidentiality protection?

The answer appears to be two-fold. First, section 574 is both a relatively new and a relatively complex statute. In turn, subsection (j) draws into the analysis an even more complex statute with a large and intricate body of caselaw. Only the most sophisticated ADR users are likely to understand the full implications of the relationship between section 574 and therefore, to anticipate the range of confidentiality issues that might arise. As familiarity with the intersection of ADR and FOIA grows and as ADR in federal administrative practice begins to encounter what might be called "second-generation" procedural issues, it is reasonable to expect that confidentiality issues will loom larger in decisions as to whether and to what extent to participate in ADR.

Second, the scope of the problem simply cannot be gauged meaningfully by seeking to identify the number of instances in which confidentiality has become a contested issue in a federal ADR proceeding. In part, such a number would exclude the potentially large group of cases in which either a party (or, perhaps more troubling, a nonparty) has for lack of sophistication failed to realize that FOIA may be available to gain access to dispute resolution communications. These cases are, in a sense, time bombs which may at any time explode into disenchantment with ADR confidentiality. Even a single case of expected confidentiality being undermined by a FOIA claim could precipitate a damaging loss of trust in the confidentiality of ADR processes. But more importantly, focusing only on the cases in which confidentiality is contested would exclude those instances in which a party (within or without an agency) grasped the general contours of the FOIA issues as they relate to ADR and chose simply, in light of uncertainty about confidentiality, not to pursue the alternative process. There is reason to believe that subsection (j) of section 574 has a chilling effect of this nature on the use of ADR in federal agencies.

---

[43] The importance of confidentiality to ADR is thoroughly presented in the *Harter Report*. No effort is made in this report to retrace what is well documented there. Nor is there any apparent basis on which to conclude that the need for confidentiality has in any way diminished since the date of that report.

Generally agency officials involved in ADR and interviewed for this study observed that, in their agencies and/or in others with which they were familiar, uncertainty about the effect of FOIA on ADR confidentiality represented a deterrent to broader use of alternative dispute resolution processes. In those instances in which the interviewed officials believed this uncertainty had not chilled interest in ADR, the most common further observation was that the effect had not been seen largely because of a lack of party sophistication about the potential problem.[44] A number of agencies, in reporting formally to ACUS on their experiences with ADR, have taken the position that uncertainty about the effect of FOIA on confidentiality is a serious concern.[45] Similar concern is reflected in reports and recommendations of professional bodies with an interest in ADR at the federal level.[46]

Even among some agency officials involved substantially in ADR, limited understanding of the potential FOIA issues appears to lead some to convey to parties assurances regarding confidentiality that cannot be met because of the effect of subsection (j). In a number of cases written confidentiality agreements omit entirely reference to the limitations imposed by FOIA. As a result, individual parties participating in ADR may be lulled into a false sense of security with respect to confidentiality, and users of ADR may lose trust in the system generally if at some point an apparent assurance of confidentiality is trumped.

---

[44] The following agency officials familiar with the alternative dispute resolution activities in their respective agencies were interviewed by telephone for this study. They gave only their individual views based on their experience and did not purport to speak officially for their agencies:

> David C. Batson, Environmental Protection Agency; Charlotte Caplow, Federal Deposit Insurance Corporation; Rosalie D'Angelo, Department of State; Jeffrey Domber, General Services Administration; Don Greenstein, Department of Justice; Phyllis Hafling, Department of Energy; Ilene Hoffman, Federal Mediation and Conciliation Service; James A. Jones, Department of Labor; Jeff Knishkowy, Department of Agriculture; Renee Landers Department of Justice; Martha McClellan, Resolution Trust Corporation; Joseph M. McDade, Department of the Air Force; John Settle, Department of Health and Human Services; Patricia Sheridan, Department of Veterans Affairs.

[45] Letters on file at the offices of the Administrative Conference of the United States.

[46] Recommendation of the American Bar Association (proposed jointly by the Standing Committee on Environmental Law, the Section on Administrative Law and Regulatory Practice, and the Section on Natural Resources, Energy, and Environmental Law) (1994).

V. Fulfilling the Goals of Federal ADR

To acknowledge that subsection (j) may chill broader use of ADR in federal agencies does not resolve the question left open when the ADRA was passed, as reflected in the Grassley-Leahy exchange on the Senate floor: How should need for confidentiality protection to promote the use of ADR be reconciled with the need for public access to government information as reflected in the policies of FOIA?

One answer to this question may be to structure ADR to minimize the likelihood of entanglement with FOIA in a way that would inhibit use of alternative processes. The most obvious approach here would be to limit reliance on government employees as neutrals. If neutrals are not agency employees, the records they receive or create would not, by virtue of their receipt or creation, become agency records subject to FOIA.[47] This outcome could be strengthened by terms in the contracts with outside neutrals that make clear that records produced in the ADR proceeding are records of the contractor and not the agency. While FOIA caselaw would still leave some uncertainty about the status of these records, such contractual arrangements at least diminish the directness of a claim that a dispute resolution communication is an agency record.

This approach, however, has several possible undesirable affects. First, the cost of obtaining outside neutrals may in itself deter the use of alternative processes. Second, agency employees with substantive expertise in particular areas may, for some forms of ADR, be better suited to conducting ADR than an inexpert outside neutral. Third, using only outside neutrals may undermine the "acceptability" to the parties' standard of ADRA. Finally, and perhaps most importantly, this approach does not answer, but instead avoids, the question of how public access policy should accommodate the needs of ADR by making openness and confidentiality turn on the essentially irrelevant matter of the status of the person serving as the neutral.

A second answer may be to develop a records management policy with respect to ADR that ensures that dispute resolution communications that are not necessary to retain as records of agency functions are disposed of as soon as they no longer serve an immediate purpose in the ADR proceeding. This practice is followed in many agencies. While the approach has considerable utility, again it avoids the central question of how ADR policy and FOIA policy should be reconciled and, in some forms, may raise issues under the Federal Records Acts.[48] In any event, sound federal records management policy should not be skewed simply to meet a need for confidentiality where a more direct approach could serve both purposes.

---

[47] *See* Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

A third solution may be to develop educational programs that would better inform agency personnel and other potential users of ADR of how the confidentiality protections of section 574 relate to disclosure obligations under FOIA. As noted earlier, in many cases where dispute resolution communications become "agency records," one or more of the FOIA exemptions may apply to protect the record from public disclosure. Potential participants, once better informed about the risk of FOIA disclosure in the circumstances of a particular dispute and the records it is likely to generate, may decide that sufficient protection is in fact available. Establishing a better understanding of the relationship of FOIA to ADR is independently a desirable objective. But since by definition it seeks only to establish an understanding of the existing relationship, it does not address the problem of possible gaps in protection needed for ADR.

A fourth solution may be to develop a litigation strategy to promote ADR-favorable judicial interpretation of FOIA exemptions. As noted earlier, recognition of a settlement privilege as a component of a FOIA exemption has generally met judicial resistance. With the growth in acceptance of the importance of ADR, there may be a greater willingness on the part of the courts in appropriate cases to apply a settlement privilege. Similarly, general interpretation of the FOIA exemptions may have beneficial effects for confidentiality in ADR. For example, the relatively recent *en banc* decision of the D.C. Circuit in *Critical Mass Energy Project v. NRC*[49] reduced the burden for invoking Exception 4 protection for "commercial or financial information" submitted "voluntarily" to an agency. Nevertheless, surprising subtlety in FOIA caselaw may limit the utility of this decision to protect dispute resolution communications, on the theory that while the decision to participate in ADR may be voluntary, once a party has agreed to participate submission of information in the process is no longer "voluntary" within the meaning of *Critical Mass*.[50]

A fifth answer would be to amend subsection (j) of section 574 to tailor its approach to FOIA to the need for confidentiality in ADR. Under this approach subsection (j) would be amended to express some limited form of protection from mandatory disclosure for agency records that are also dispute resolution communications. This approach would be directly responsive to the question of how to reconcile ADR confidentiality policy and public access policy. It would, however, treat the two policies as distinct. With the exception of subsection (j), Congress adopted in section 574 a comprehensive scheme to balance the need for confidentiality in ADR with the need for openness in government. The balance struck may be viewed by some as being too solicitous of the interest of confidentiality or by others as unduly protective of the interest of openness in government. But the balance is of precisely those interests that shape public information policy throughout government. If amendment is in order, then, it would seem that it should be in the substantive provisions of section 574, not in the subsection that serves only to preclude giving Exemption 3 effect to the terms of that section. Yet nothing in the legislative history of section 574 or in the interim legislative compromise that led to the addition of subsection (j) identifies a particular flaw in balance struck.

---

[48] 44 USC 2901 et seq. (1994).

[49] 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S.Ct. 1579 (1993).

[50] *Cf.* FOIA Update, Vol. XIV, no. 2; pp. 3-5 (U.S. Dept. of Justice, Office of Information and Privacy (Spring 1993).

A sixth answer would be to repeal subsection (j). To do so would be, in all probability, to give section 574 effect as an Exemption 3 statute. Alternatively, this result could be accomplished with greater certainty by amending subsection (j) to provide explicitly that section 574 is to be construed as an Exemption 3 statute. While this approach would not address possible concerns that section 574 is too broad or too narrow in the protection it affords dispute resolution communications, it would focus the confidentiality issue on a single statutory provision enacted specifically to meet ADR needs and allow development of the law to proceed in this context. Judicial interpretation of section 574, as so amended, would presumably take place with a recognition that the substantive provisions of the statute seek to balance the need for confidentiality in ADR against the need for openness in government. It would not mean that all uncertainty regarding confidentiality would be resolved. It would mean, however, that a single, purpose-specific, statutory framework would be used for resolving ADR confidentiality issues and that agency officials and participants in ADR could rely on a unitary policy in planning and implementing informal administrative dispute resolution processes.

VI. Conclusion

The addition of subsection (j) to the confidentiality section of the ADRA has created a narrow, but significant, problem in accomplishing fully the purposes of the Act. In those circumstances in which dispute resolution communications become “agency records” within the meaning of FOIA, the confidentiality of the records is determined not by the provisions of section 574, but rather by the terms of the exemptions to FOIA. For users of ADR, the trumping effect of FOIA in this class of cases means that confidentiality is not governed by the careful balance struck in section 574 but rather by the complex body of FOIA law which accords essentially no protection for dispute resolution communications on the basis of the process needs of ADR. While some dispute resolution communications that become agency records, for example because they come under the control of a government-employee neutral, may be exempt from mandatory disclosure under FOIA, the scope of the exemptions and possible gaps in coverage leave, at a minimum, uncertainty as to the confidentiality of such records.

This uncertainty, in turn, can become a disincentive to the use of ADR. Even though the ADRA has been in place for only four years, there is reason to believe that, particularly among sophisticated potential users of ADR, concern about the impact of FOIA on confidentiality has had a chilling effect on the use of ADR and that the effect could be even more substantial either if less sophisticated potential users were aware of the gap in protection or if a case arose in which expected confidentiality was undermined by a FOIA claim. While the problem can be controlled to some extent by greater use of non-governmental neutrals or by strict policies that avoid the preservation of records, these limited solutions may impose additional costs on the use of ADR and may undermine other important ADR objectives. To accomplish the ADR use-promoting objective of Recommendation 88-11, the confidentiality standards of section 574 should be given effect with respect to all covered dispute resolution communications even where those communications become an agency record under FOIA. Agencies and other parties proceeding under the ADRA should not, however, be free to use the "agreed to" alternative confidentiality procedures permitted by subsection (d) of section 574 to provide a broader FOIA exemption than would be available under the specific terms of section 574.[51] In short, the standards of section 574 should be allowed to operate as the governing standard for confidentiality in federal administrative dispute resolution.

Recommendation

The confidentiality section of the Administrative Dispute Resolution Act, 5 USC 574, should be amended to provide that the section is a statute specifically exempting records from disclosure under Exemption 3 of the Freedom of Information Act, 5 USC 552(b)(3), and to further provide that alternative confidentiality procedures agreed to under section 574(d) shall not, for purposes of Exemption 3, be construed to provide broader confidentiality than otherwise available under section 574.

---

[51] *See supra*, note 11 and accompanying text. If section 574 were treated as an Exemption 3 statute, it is possible that an agreement reached among parties for alternative confidentiality procedures under subsection (d) could be argued to be entitled to respect as part of the FOIA exemption. While for non-FOIA purposes there is no reason that such agreements should not be given effect, to permit them to control FOIA outcomes gives unwarranted control to agencies and parties to set public access standards.

Appendix

5 USC § 574 (1994)

§ 574.

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication, unless—

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such communication is disclosed only to the extent necessary to resolve such dispute.

(j) This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.

Report for Recommendation 95-7

Dispute Resolution under the Americans with Disabilities Act

Ann C. Hodges
Professor of Law
University of Richmond

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

INTRODUCTION 585
I. THE AMERICANS WITH DISABILITIES ACT 585
  A. Title I - Employment 586
  B. Title II - Public Entities 588
  C. Title III - Public Accommodations 589
  D. Title IV - Telecommunications 590
II. ADA ENFORCEMENT PROCEDURES 591
  A. Title I 591
  B. Title II 591
III. TITLE III 593
  D. Title IV 594
  E. Title V 594
IV. DISPUTE RESOLUTION UNDER THE ACT 594
  A. Title I 594
  B. Titles II and III 601
    1. Department of Justice 601
    2. Department of Transportation 604
  C. Title IV 606
  D. Summary of Existing Dispute Resolution 606
IV. ALTERNATIVES TO EXISTING DISPUTE RESOLUTION METHODS 607
  A. Administrative Litigation 608
    1. The Fair Housing Act System 608
    2. Analysis of Administrative Litigation 611
  B. Early Intervention Programs 616
    1. The Rapid Charge Processing System 616
    2. Washington Field Office Program 617
    3. Office of Civil Rights Program 618
    4. Analysis of Early Intervention Programs 618
  C. Alternative Dispute Resolution 621
    1. The Role of ADR in ADA Cases 621
    2. Analysis of Other Mediation Systems in Civil Rights Cases 625
    3. An ADA Mediation Proposal 630
      a. Voluntary or Mandatory Mediation 632
      b. The Timing of Mediation 634
      c. The Source of Mediators 639
      d. Agency Review and Approval of Settlements 645
      e. Enforceability of Mediated Agreements 646

        f. Power Imbalances 647
        g. Confidentiality 650
        h. Technical Experts 650
        i. Monitoring and Evaluation 651
    4. Other Uses of ADR 654
        a. Arbitration 655
        b. Other Forms of ADR 660
V. CONCLUSION 661

Introduction

The Americans With Disabilities Act ("ADA") was passed by Congress in 1990 and became effective in 1992. The statute prohibits discrimination against individuals with disabilities by employers, state and local governments, and public accommodations. With more than two years experience under the statute, an assessment of the effectiveness of the dispute resolution procedures is appropriate. This report will begin with a brief overview of the statute, followed by an analysis of the dispute resolution procedure under each title. The report will then discuss the effectiveness of existing dispute resolution procedures. Finally, the report will make recommendations for improving the dispute resolution procedures, including a specific recommendation for adoption of a mediation program, in order to effectuate the purposes of the statute.[1]

I. The Americans With Disabilities Act

With the passage of the Americans With Disabilities Act Congress extended protection against disability discrimination to large segments of the population not previously protected. The preexisting Rehabilitation Act of 1973 banned discrimination by the federal government, government contractors, and recipients of federal funds.[2] The reach of that statute left much disability discrimination untouched by federal law, however. Congress determined that additional federal legislation was necessary to eliminate discrimination against the estimated 43 million Americans with disabilities, discrimination which costs billions of dollars by fostering unnecessary dependency and nonproductivity.[3] Much of the statutory language in the ADA is based on the Rehabilitation Act and the regulations issued pursuant to that Act, which should facilitate interpretation of the ADA.

---

[1] As specifically set forth in the statute, the ADA's purpose is as follows:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 USC §12101(b).

[2] *See* 29 USC §§791, 793-95.

[3] *See* 42 USC §12101.

Disability under the ADA is defined as "a physical or mental impairment that substantially limits one or more of the [individual's] major life activities...."[4] Major life activities are those that the average person can perform with little or no difficulty, including walking, seeing, hearing, breathing, learning, working, caring for oneself, and participating in community activities.[5] Individuals who have a history of disability or are perceived to have a disability, even if they do not, also meet the statutory definition of disability.[6] The ADA contains five titles, the first four dealing with specific aspects of discrimination and the fifth containing miscellaneous provisions. Title I deals with employment discrimination, Title II with discrimination in public services, Title III with discrimination in public accommodations, and Title IV with telecommunications services for individuals with hearing and speech impairments. Each of these four titles will be analyzed in more detail below. Notable among the provisions of Title V are Sections 506 and 513. Section 506 requires the agencies primarily responsible for administration of the statute to provide technical assistance to covered entities, individuals with rights under the statute, and other federal agencies.[7] Section 513 encourages the use of alternative dispute resolution where appropriate and authorized by law.[8]

A. Title I - Employment

The employment provisions of the ADA cover employers with fifteen or more employees.[9] Title I prohibits discrimination against "a qualified individual with a disability because of the disability...in regard to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions, and privileges of employment."[10] Three key concepts in the employment provisions are: 1) what constitutes a disability; 2) who is a qualified individual with a disability; and 3) what is discrimination.

---

[4] 42 USC §12102(2)(a). While the term physical or mental impairment is not defined in the statute, the legislative history indicates that the term includes "(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; neuromuscular; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Senate Report No. 116, 101st Cong., 1st Sess., at 22 (1989). The statute expressly eliminates certain conditions from the definition of disability, including homosexuality, bisexuality, compulsive gambling, kleptomania, pyromania, disorders resulting from current illegal drug use, "transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders." 42 USC §12211.

[5] *See* 29 CFR §1630.2(i).

[6] *See* 42 USC §§12102(2)(B) and (C).

[7] *See* 42 USC §12206.

[8] *See* 42 USC §12212.

[9] *See* 42 USC §12111(5)(A).

[10] 42 USC §12112(a).

The determination of disability is the same for all titles of the ADA and is discussed above. With respect to the second issue, in order to bring a claim of discrimination, an individual must establish that she is a qualified individual with a disability, i.e. that, with or without reasonable accommodation, she can perform the essential functions of the job.[11] "Essential functions of the job" and "reasonable accommodation" are both terms of art under the statute. The essential functions of the job are those duties that are fundamental rather than marginal.[12] The determination of whether a function is essential is based on the employer's judgment, written job descriptions, the amount of time spent on the function, the experience of the employees in the same or similar jobs, the terms of any collective bargaining agreement, and the consequences of not requiring the employee to perform the functions.[13] Reasonable accommodation will be discussed below.

Discrimination barred by Title I includes: 1) intentional discrimination; 2) use of standards, criteria, methods of administration, or tests that have the effect of discrimination; 3) participating in a relationship that causes employees or applicants to be subjected to discrimination; 4) discrimination based on an employee or applicant's relationship with an individual with a disability; and 5) failure to reasonably accommodate a qualified individual with a disability.[14]

Required reasonable accommodations may include, but are not limited to, making facilities accessible, job restructuring, modifying work schedules, reassigning the employee to a vacant position, acquiring or modifying equipment or devices, or providing readers or interpreters.[15] The employer must make the accommodation(s) necessary to allow a disabled employee or applicant to perform the essential functions of a job, unless the accommodation(s) would create undue hardship.[16] Undue hardship is established by demonstrating that making the accommodation(s) would require significant difficulty or expense.[17]

Title I provides several defenses to a claim of discrimination. An employer may justify the use of job qualifications, selection criteria, or tests that have a discriminatory impact by establishing that they are job related and consistent with business necessity.[18] In addition, an employer may require that an individual not pose a direct threat to the health or safety of others in the workplace.[19] As noted above, an employer may refuse to reasonably accommodate a disabled individual if the accommodation would impose undue hardship. Additionally, an employer may defend against an ADA claim by proving that an individual is not disabled, or not qualified for the position, or that the individual was not discriminated against because of the disability.

---

[11] *See* 42 USC §12111(8).

[12] 29 CFR §1630.2(n).

[13] *See* 42 USC §12111(8); 29 CFR §1630.2(n).

[14] *See* 42 USC §12112.

[15] *See* 42 USC §12111(9).

[16] *See* 42 USC §12111(10).

[17] *See* 42 USC §12111(10)(A).

[18] *See* 42 USC §12113(a).

Along with the other prohibitions on discrimination, the ADA directly limits both inquiries about disability and medical examinations. An employer may make inquiries about an applicant's ability to perform the job, but not about the applicant's disability.[20] The employer can require an applicant to take a medical exam only after an offer of employment is made.[21] The offer may be conditioned on the results of the exam only if all new employees in the same job category are subjected to the exam, the medical information is kept confidential, and any disqualification resulting from the exam is based on criteria that are job related and consistent with business necessity.[22] Employers may make inquiries of employees about disabilities and require medical exams of employees only if the inquiries and exams are "job related and consistent with business necessity."[23]

B. Title II - Public Entities

Title II of the ADA proscribes discrimination against qualified individuals with disabilities by public entities. Public entities include: 1) state and local governments; 2) departments, agencies, special purpose districts or other "instrumentalit[ies] of a State or States or local government[s];" and 3) passenger railroads.[24] In addition to the broad prohibition against discrimination, Title II specifies that qualified individuals with disabilities cannot "be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity."[25] Employment discrimination actions against public entities may be brought under Title I or Title II.[26] Title II also contains detailed requirements that public transportation systems must meet to avoid violation of the discrimination prohibitions.[27]

---

[19] *See* 42 USC §12113(b).

[20] *See* 42 USC §12112(c)(2).

[21] *See* 42 USC §12112(c).

[22] *See* 42 USC §12112(c)(3).

[23] 42 USC §12112(4)(A).

[24] 42 USC §12131.

[25] 42 USC §12132.

[26] *See* 28 CFR §35.140; Petersen v. University of Wisconsin, 818 F. Supp. 1276, 1278-79 (W.D.Wis. 1993).

[27] *See* 42 USC §§12141-12150, §§12161-12165.

C. Title III - Public Accommodations

Title III of the ADA bans discrimination by public accommodations if their operations affect commerce.[28] The definition of public accommodation is quite broad, including restaurants, hotels, theaters, retail establishments, auditoriums, schools, museums, libraries, public transportation stations, service establishments, social service agencies, and recreational establishments.[29] A public accommodation, which includes the owner, lessor, lessee, or operator, cannot discriminate on the basis of disability in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations."[30]

Title III not only requires accessibility to the establishment, but also requires access to services and facilities in an integrated setting.[31] The ADA requires that public accommodations modify practices and procedures to ensure access for individuals with disabilities, unless the changes would fundamentally alter the nature of the services or facilities.[32] Also, a person with a disability cannot be denied services because of the absence of "auxiliary aids or services" including interpreters, readers, or equipment or devices that would enable communication with those who are hearing or visually impaired, unless use of such aids would fundamentally alter the nature of the services or impose an undue burden.[33]

A public accommodation cannot use eligibility criteria that screen out individuals with disabilities from full and equal enjoyment of goods, services or facilities unless such criteria are necessary to the provision of the goods, services or facilities.[34] Like the employment provisions, the public accommodation title prohibits discrimination based on association with an individual with a disability.[35] Additionally, Title III contains specific provisions directed at public transportation supplied by private entities.[36]

Public accommodations must remove architectural and communication barriers where removal is "readily achievable," which is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[37] If removal of a barrier is not readily achievable, access to the services or facility must be made available through readily achievable alternative means.[38] In addition to the barrier removal requirements, the statute specifies that new construction and substantial alterations to existing facilities must comply with distinct specific guidelines for accessibility.[39]

---

[28] *See* 42 USC §§12182(a), 12181(7). The new construction and alterations provisions of Title III, see *infra* note 40 and accompanying text, apply to commercial facilities as well as places of public accommodation. *See* 42 USC §12183. Commercial facilities are facilities intended for nonresidential use with operations that affect commerce. *See* 42 USC §12181(2).

[29] *See* 42 USC §12181(7).

[30] 42 USC §12182.

[31] *See* 42 USC §12182(b)(1)(B).

[32] *See* 42 USC §12182(b)(2)(A)(ii).

[33] *See* 42 USC §§12182(b)(2)(A)(iii), 12102(1).

[34] *See* 42 USC §12182(2)(A)(i).

[35] *See* 42 USC §12182(1)(E).

[36] *See* 42 USC §§12182(b)(2)(B), (C), (D), 12184.

[37] *See* 42 USC §§12182(b)(2)(A)(iv), 12181(9).

The legislative history of these provisions suggests that accessibility of every part of every facility is not necessarily required, but the ADA "contemplates a high degree of convenient accessibility" of parking, routes to and from the facility, entrances, restrooms, water fountains, public areas, work areas and service areas.[40] Readily achievable alterations would include, for example, small ramps, raised letter and braille markings on signs and elevator controls, grab bars, flashing alarm lights, and lower telephones.[41]

D. Title IV - Telecommunications

Title IV amends Title II of the Communications Act and is designed to ensure the availability of communication by wire or radio for individuals with speech or hearing impairment in a manner "functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment."[42] The Federal Communications Commission ("FCC") was authorized to use its enforcement authority under the Communications Act to ensure that both interstate and intrastate communication services are available within three years of enactment of Title IV.[43] Pursuant to this authority the FCC has mandated that "each common carrier providing telephone voice transmission services" provide telecommunications relay services for intrastate and interstate communications.[44] These services must be provided at rates no greater than those paid for comparable voice communication services.[45]

---

[38] *See* 42 USC §12182(b)(2)(A)(v).

[39] *See* 42 USC §12183(a)(1) (new construction); 42 USC §12183(a)(2) (alterations). As noted *supra* note 29, these requirements apply to commercial facilities as well as public accommodations.

[40] *See* S. Rep. No. 116, *supra* note 5, at 69.

[41] *See* S. Rep. No. 116, *supra* note 5, at 66.

[42] *See* 47 USC §225(a)(3), (b).

[43] *See* 47 USC §225(b).

[44] 47 CFR §64.603.

[45] *See* 47 CFR §64.604.

II. ADA Enforcement Procedures

A. Title I

Title I adopts the enforcement mechanisms of Title VII of the Civil Rights Act of 1964.[46] Accordingly, exhaustion of administrative remedies is required as a prerequisite to filing suit alleging a violation of Title I. A charge must be filed with the Equal Employment Opportunity Commission ("EEOC"), which investigates, determining "whether there is reasonable cause to believe that the charge is true."[47] If so, the EEOC is required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."[48] The EEOC[49] may file suit based on the charge, if conciliation efforts have failed, or alternatively, the EEOC may decline to do so, notifying the complainant of its determination.[50] The complainant has ninety days from receipt of the EEOC's notice to file a judicial action.[51] In addition to its enforcement authority, the EEOC has authority to issue regulations to carry out Title I and has done so.[52]

B. Title II

Title II adopts the procedures of Section 505 of the Rehabilitation Act for enforcement.[53] The legislative history indicates Congressional intent that enforcement follow the model under Section 504 of the Rehabilitation Act, which applies to federal fund recipients.[54] The Department of Justice is authorized to file suits for enforcement of Title II.[55] In addition, individuals with disabilities have a private right of action under Title II and need not exhaust federal administrative remedies as a prerequisite to suit.[56]

---

[46] *See* 42 USC §12117(a).

[47] *See* 42 USC §2000e-5.

[48] *Id.*

[49] In the case of a governmental respondent, the Commission must refer the case to the Attorney General for filing of the civil suit. *Id.*

[50] Conciliation is a prerequisite to suit filed by the Commission or Attorney General, but a suit by the charging party is not barred by the Commission's failure to conciliate. Mack A. Player, et al., EMPLOYMENT DISCRIMINATION LAW 667 (1990).

[51] *See* 42 USC §2000e-5(f). The complainant may file suit after receipt of the notice regardless of whether the Commission found reasonable cause or no reasonable cause. *Id.*

[52] *See* 42 USC §12116; 29 CFR §§1630.1-1630.16.

[53] *See* 42 USC §12133.

[54] *See* H.R. Rep. No. 485, 101st Cong., 2d Sess. at 98 (1990). Section 505 contains enforcement procedures for both Section 504 actions and Section 501 actions. *See* 29 USC §794a. Section 501 covers employees of the federal government. *See* 29 USC §791.

[55] H.R. Rep. No. 485, *supra* note 55, at 98.

[56] *Id.*

Although filing a complaint with the enforcement agency is not a prerequisite to suit, an individual may file a complaint alleging a violation of Title II. Investigation of complaints is handled by various agencies, including the Department of Justice, as designated in the regulations.[57] All complaints must be filed within 180 days from the date of the alleged discrimination.[58] The regulations require the appropriate agency to investigate the complaint and attempt informal resolution.[59] If no resolution is reached a Letter of Findings is issued to the complainant and the public entity, and where the agency finds that the entity is not in compliance with the statute, it will attempt to negotiate an agreement for voluntary compliance.[60] If no agreement is reached, the case is referred to the Attorney General for "appropriate action."[61]

If the public entity is a federal fund recipient, which is probable, it is also covered by Section 504 of the Rehabilitation Act.[62] Termination and suspension of funding are available remedies under Section 504.[63] Prior to termination or suspension of funding, the entity is entitled to a hearing.[64]

The Secretary of Transportation has the authority to issue regulations to carry out Parts I and II of Subtitle B of Title II, which deal with public transportation provided by public entities.[65] The Attorney General has the authority to issue regulations to carry out the remainder of Title II.[66] The regulations must be consistent with those issued pursuant to Section 504 of the Rehabilitation Act.[67] Regulations under both subtitles have been promulgated.[68]

---

[57] *See* 28 CFR §§35.170 - 35.178, 35.190. The Department of Transportation handles complaints relating to transportation, including highways, public transportation, traffic management, automobile licensing and inspection, and driver licensing. 28 CFR §35.190(b)(8). The agency's authority as an investigating agency under the regulations is identical to that of the other seven designated agencies, and distinct from its regulatory and enforcement responsibility under Title II, Part B dealing with public transportation by public entities. *See* 42 USC §12141 - 12161.

[58] 28 CFR §35.170(b).

[59] *See* 28 CFR §35.172.

[60] *See* 28 USC §35.173.

[61] *See* 28 CFR §35.174.

[62] *See* 29 USC §794.

[63] *See* 29 USC §794(a)(2); Mack A. Player, EMPLOYMENT DISCRIMINATION LAW 609 (1988).

[64] *See* 28 CFR §41.5 (requiring each enforcement agency under the Rehabilitation Act to establish an enforcement system which includes the enforcement and hearing procedures adopted for Title VI); 34 CFR §100.8 (Department of Education regulations under Title VI requiring hearing); 49 CFR §§27.125, 27.127 (Department of Transportation regulations requiring hearing under the Rehabilitation Act).

[65] *See* 42 USC §§12149, 12164. The regulations must be consistent with accessibility guidelines promulgated by the Architectural and Transportation Barriers Compliance Board in accordance with Section 504 of Title V of the ADA. *See* 42 USC §§12149(b), 12163 (requiring consistency) and 42 USC §12204 (requiring the Architectural and Transportation Barriers Compliance Board to issue guidelines for accessibility).

[66] *See* 42 USC §12134.

[67] *See* 42 USC §12134(b), (c).

[68] *See* 28 CFR §§35.101 - 35.190 (Department of Justice regulations); 49 CFR §§37.1 - 37.169, 38.1 - 38.179 (Department of Transportation regulations implementing Titles II and III of the ADA).

III. Title III

Individuals subject to discrimination under Title III can sue for injunctive relief, but not damages.[69] Exhaustion of administrative remedies is not required. Available injunctive relief would include orders to alter facilities, provide an auxiliary aid, modify policies, or provide services or goods by alternative methods.[70]

Title III authorizes the Attorney General to file a civil action when discrimination raises an issue of "general public importance" or where there is reasonable cause to believe that a person "is engaged in a pattern or practice of discrimination."[71] In cases brought by the Attorney General compensatory damages and civil penalties are available.[72] The Attorney General has investigation responsibility for alleged violations of Title III as well as responsibility for periodic compliance reviews.[73] Finally, after public hearing and in consultation with the Architectural and Transportation Barriers Compliance Board, the Attorney General is authorized to certify that state laws, local building codes, or other ordinances that establish accessibility mandates meet the requirements of Title III.[74] The certification provides rebuttable evidence of compliance with the Act.[75]

Regulations for the transportation provisions of Title III were issued by the Secretary of Transportation.[76] Regulations for the remaining provisions of Title III were issued by the Attorney General.[77] Congress specified that the regulations must be consistent with accessibility guidelines promulgated by the Architectural and Transportation Barriers Compliance Board in accordance with Title V of the ADA.[78]

---

[69] *See* 42 USC §12188(a).

[70] *See id.*

[71] 42 USC §12188(b)(1)(B).

[72] *See* 42 USC §12188(b)(2).

[73] *See* 42 USC §12188(b)(1)(A)(i). While the statutory language states that the Attorney General "shall investigate" alleged violations of Title III, *id.*, the Department of Justice has taken the position that investigation of Title III cases is discretionary, while investigation of Title II cases is mandatory. Meeting with representatives of the Department of Justice, Public Access Section, March 28, 1994.

[74] *See* 42 USC §12188(b)(1)(A)(ii).

[75] *See id.*

[76] *See* 42 USC §12186(a); 49 CFR §§37.1-37.179, 38.1-38.179.

[77] *See* 42 USC §12186(b); 28 CFR §§36.101-36.608.

[78] *See* 42 USC §12186(c) (requiring consistency); 42 USC §12204 (requiring the Architectural and Transportation Barriers Compliance Board to issue guidelines for accessibility); 28 CFR Part 36, Appendix.

D. Title IV

The Federal Communications Commission has issued regulations for implementation of Title IV, as mandated, to ensure compliance with the requirements of the statute.[79] The Commission is authorized to certify state compliance programs which meet the requirements for federal certification.[80] Complaints alleging violation of Title IV are filed with the FCC or with a certified state program if it involves intrastate services in such a state.[81] The Commission must resolve complaints of violations of Title IV by final order within 180 days of filing.[82] If a state does not resolve a complaint within 180 days, jurisdiction over the complaint reverts to the FCC.[83]

E. Title V

Section 513, which deals with alternative dispute resolution, provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.[84]

IV. Dispute Resolution Under the Act

A. Title I

The EEOC has an increasing backlog of cases which was only exacerbated by enactment of the ADA.[85] In the first two quarters of fiscal 1994, 8669 ADA charges were filed, an increase of 38% from the previous year.[86] This increase occurred before July 26, 1994, when the threshold for ADA coverage dropped from 25 employees to 15 employees, which is expected to generate significant additional ADA cases.[87] Parties who deal with the agency are increasingly frustrated at the length of time that it takes to investigate complaints and issue determinations.[88] The immense caseload and the inability to achieve quick resolutions of cases also frustrate agency personnel.[89] Despite the increasing backlog, Congress recently voted to reduce the EEOC's budget, which will further exacerbate this problem.[90]

---

[79] *See* 47 USC §225(d); 47 CFR §§64.601-64.608.

[80] *See* 47 USC §225(f).

[81] *See* 47 CFR §64.604(5).

[82] *See* 47 USC §225(e).

[83] *See* 47 CFR §47.604(5).

[84] 42 USC §12212.

[85] *See EEOC, Civil Rights Commission Chiefs Make Case to Congress for Budget Increases*, 1994 Daily Lab. Rep. (BNA) 56 d20 (March 25, 1994); *House Labor Subcommittee Approves Bill Consolidating Federal EEO Authority*, 1994 Daily Lab. Rep. (BNA) 17 d6 (January 27, 1994). By the end of the second quarter of fiscal 1994, the number of pending cases was 85,212, an increase of 21,547 cases over the previous year. *EEOC Struggles with Caseload*, 45 LAB. L.J. 432 (1994). By late 1994, the backlog was over 90,000 cases. See EEOC Chair to Address Agency Problems, 147 Lab. Rel. Rep. (BNA) 404, 405 (November 28, 1994).

[86] *See EEOC Struggles with Caseload*, *supra* note 86, at 432.

The backlog problem is somewhat mitigated by the procedure that permits a charging party[91] to request the EEOC to issue a notice of right to sue if 180 days have passed since the filing of a charge without completion of the investigation.[92] An individual who desires to litigate can simply wait the 180 days, request the notice, and file suit. Less sophisticated individuals, individuals without lawyers, or those who hope for agency action on the charge, however, are unaided by this provision. In addition, the Congressional goal of encouraging informal resolution of the charge through the conciliation process is frustrated.[93]

Because of the backlog, among other factors, the number of cases litigated under the employment provisions of the ADA is extremely small in relation to the number of charges filed. From the effective date of the statute through December

---

[87] *See id.*

[88] *See EEOC Official and Attorneys Discuss Challenges Posed by Record Charge Rate,* 1994 Daily Lab. Rep. (BNA) 54 d16 (March 22, 1994); Comments of Equal Employment Advisory Council in Response to EEOC's Request for Comments on Alternative Dispute Resolution, Letter to Frances M. Hart from Jeffrey A. Norris, September 16, 1993, at 2.

[89] *See EEOC Official Discusses Record Charge Rate,* 145 Lab. Rel. Rep. (BNA) 381 (March 28, 1994); *Latest EEOC Data Show Record Charges, Sharp Increase in Inventory of Cases,* 1993 Daily Lab. Rep. (BNA) 152 d5 (August 10, 1993) (Although the agency increased its resolution of charges in 1993, the number of charges awaiting resolution also increased by almost 32% generating significant concern on the part of the agency).

[90] *See Congress Approves Legislation Cutting EEOC Budget,* 146 Lab. Rel. Rep. (BNA) 558 (August 29, 1994). The EEOC received virtually no increase in funding or staffing when ADA cases were added to its enforcement responsibilities, despite the fact that ADA cases now constitute about 20% of the agency's caseload. *See* David R. Sands, *Charges of Bias on the Job Rising Fast,* THE WASH. TIMES at D5 (April 2, 1994); *EEOC Must Begin to Deal With its Growing Workload,* 143 Lab. Rel. Rep. (BNA) 495 (August 16, 1993). The EEOC has 559 fewer staff members than in 1980 despite the additional workload generated by the ADA and the Civil Rights Act of 1991. *EEOC, Civil Rights Commission Chiefs Make Case to Congress For Budget Increases,* 1994 Daily Lab. Rep. (BNA) 56 d20 (March 25, 1994).

[91] The terms charging party and complainant are used interchangeably throughout the report for individuals who file charges with the various agencies alleging violations of the ADA. The party charged with the violation is referred to as the respondent.

[92] *See* 42 USC §2000e-5(f); 29 CFR §1601.28.

[93] *See* 42 USC §2000e-5(b); 29 CFR §1601.24. *See also Departing EEOC General Counsel Sees Need for New Direction at Overwhelmed Agency,* 1993 Daily Lab. Rep. (BNA) 111 d3 (June 11, 1993) (Departing General Counsel noted that the backlog of charges and failure to fund the agency to provide for voluntary resolution of disputes as contemplated under Title VII have intensified problems in administering Title VII).

31, 1994, the total number of ADA charges filed was 39,927.[94] As of that date, the EEOC had filed 48 cases in court alleging ADA violations.[95] In addition to EEOC lawsuits, suits have been filed by employees or applicants. Of the 154 ADA cases published in BNA's *Americans with Disabilities Act Cases* in 1993 and the first half of 1994, 58 were employment cases.[96] While the number of cases litigated increased in 1994 and can be expected to increase further as more cases are investigated and knowledge about the statute expands, these figures dramatically illustrate the significance of the backlog, and further demonstrate that the private right of action for plaintiffs is not moving many cases from the investigation backlog to the courts. The overwhelming majority of ADA employment cases are simply awaiting investigatory action, and few of them will ever be litigated by the agency regardless of the outcome of the investigation.

There is ongoing consideration of how to resolve the EEOC's tremendous backlog problem, including changes in the agency's structure, priorities, funding, dispute resolution mechanisms and the use of ADR.[97] This consideration is not limited to the ADA, but concerns all of the statutory responsibilities of the agency.

With respect to the use of alternative dispute resolution, the EEOC attempts to settle cases through negotiation whenever possible.[98] In cases in which it finds reasonable cause, the statute expressly requires the EEOC to conciliate prior to litigation.

---

[94] Telephone Conversation with Peggy Mastroianni, Director of ADA Policy, Equal Employment Opportunity Commission, January 23, 1995.

[95] *Id.* In the first two years under the statute, the EEOC filed 23 cases, while the number of charges filed was 29,720, a litigation rate of less than one tenth of one percent. *EEOC Has 23 Pending ADA Complaints; Many Involve Charges of AIDS Bias*, 1994 Daily Lab. Rep. (BNA) 133 (July 14, 1994). The litigation rate increased slightly in the latter half of 1994.

[96] *See ADA: Americans with Disabilities Act of 1990 Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, at 8 (August 1, 1994). Fourteen of the 45 cases in 1993 were employment cases and 44 of the 79 cases in the first half of 1994 were employment cases. *See id.* Thus, employment cases increased as a percentage of reported cases. Because the BNA data included all cases, there may be some overlap between the 48 EEOC cases and the 58 employment cases in the BNA sample.

[97] *See EEOC Chair to Address Agency Problems*, 147 Lab. Rel. Rep. (BNA) 404 (November 28, 1994); *Oversight Hearing on the Equal Employment Opportunity Commission*, Subcommittee on Select Education and Civil Rights, House of Representatives, (July 26, 1994), 1994 W.L. 386268 (F.D.C.H.) (hereinafter "*Oversight Hearing*"). *See also Fact Finding Report Issued by the Commission on the Future of Worker-Management Relations*, 1994 Daily Lab. Rep. (BNA) 105 d34 at 97 - 118 (June 3, 1994) (available on Lexis) (hereinafter "Dunlop Commission Fact Finding Report") (discussing the current system of employment regulation, litigation and dispute resolution, and considering alternative methods of handling employment-related disputes including alternative dispute resolution, a unified administrative agency, and a unified labor court.).

[98] *See* 29 CFR §1601.20.

In addition, the EEOC recently completed a pilot mediation program in which 267 of a contemplated 300 mediations were conducted.[99] The program included Title I ADA cases, among others, but was limited to cases involving discharge, discipline or alleged discrimination in terms and conditions of employment.[100] The agency contracted with the Center for Dispute Settlement to conduct mediation upon agreement of the parties.[101] The mediator, who was unconnected with the agency, was assigned the case for 60 days.[102] According to the report on the results, 87% of the charging parties agreed to mediation, but only 43% of employers agreed.[103] Agreement was reached in 52% of the mediated cases.[104]

The pilot project did not include reasonable accommodation cases under the ADA.[105] Nevertheless, agency representatives and others have suggested that reasonable accommodation cases are precisely the type of cases that should be mediated. One of the benefits of mediation is that it enables parties to resolve disputes and maintain continuing relationships. In the reasonable accommodation case, the parties can work out an accommodation that enables the employee to retain employment, thus preserving the relationship. Assessments of the pilot project indicated that employers were reluctant to mediate discharge cases, perhaps because they saw no ground for compromise.[106]

The parties to mediations in the pilot project reflected the generally high satisfaction levels - 92% believed that the mediation was fair and 80% would try it again.[107] Reviews of the agency's supervisory personnel were mixed, with the negative assessments reflecting a concern that mediation would weaken the agency's law enforcement image and a concern for the time taken by the program.[108] There was also a concern about the availability of resources for any expanded or continued use of mediation.[109] The mediation process took far less time than a full investigation,[110] but those cases that were not settled moved back into the investigation process, perhaps adding to overall processing time.[111] The agency compared settlement agreements reached in mediation and those reached through the normal agency resolution techniques and found no major differences in the remedies achieved except for slightly higher monetary benefits in the agency-settled cases.[112] One finding by the outside evaluator of the project raises some concern, however. In situations where the mediators believed that discrimination occurred, few settlements were reached.[113]

---

[99] *See* Equal Employment Opportunity Commission, Alternative Dispute Resolution (ADR) Pilot Program 1-3 (1994) (hereinafter "EEOC Report on ADR Pilot Program"); *EEOC Official Discusses Record Charge Rate*, 145 Lab. Rel. Rep. (BNA) 381 (March 28, 1994).

[100] *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 2.

[101] *See id.* at 1-2.

[102] EEOC Official Discusses Record Charge Rate, supra note 100, at 381.

[103] EEOC Report on ADR Pilot Program, *supra* note 100, at 3.

[104] *Id.*

[105] *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 2. The EEOC decided to exclude reasonable accommodation cases for several reasons. The agency had a strong interest in reducing the backlog of discharge cases, the largest category of cases at the EEOC. Also, the ADA was a new statute with no existing precedent regarding remedies. Unlike discharge cases, the EEOC did not have experience with reasonable accommodation issues under other statutes. While there are reasonable accommodation requirements for religion under Title VII, *see* TWA v. Hardison, 432 U.S. 81 (1977), and for employees with disabilities under the Rehabilitation Act, most of the statutory claims within EEOC's administrative responsibility have no such requirement. Furthermore, Congress indicated that it did not intend for the interpretation of Title VII's reasonable accommodation requirement for religion to govern the ADA. *See* H. R. Rep. No. 485, *supra* note 55, at 68; S. Rep. No. 116, *supra* note 5, at 36. Given these factors, there was concern about setting a standard for settlements in reasonable accommodation cases through outside mediation. Information from EEOC representatives and representatives of the Center for Dispute Settlement.

[106] Information from representatives of the Equal Employment Opportunity Commission. The final report indicated that only 39% of respondents agreed to mediate in the cases where the employee was terminated, but 70% agreed where the employee had resigned and 48% agreed where the employee remained employed. *See* EEOC Report on ADR Pilot Project, *supra* note 100, at 4.

In addition to the pilot project, the EEOC and the Department of Justice funded training in both the ADA and ADR for individuals with disabilities associated with disability groups.[114] Initially four hundred individuals received ADA training, which included a two hour session about ADR.[115] In the second phase of the training, about one hundred people received more advanced training, which included intensive training in ADA and ADR. Then twenty-five of the individuals were invited to Washington for a one week mediation training, at the end of which they were certified as trained mediators. Some of these individuals have been involved in training mediators who will be participating in the Department of Justice pilot mediation project discussed below.[116] Others have conducted training in their communities which has led to voluntary compliance by some businesses.[117]

---

[107] *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 5. One fairness concern was expressed by both parties. When either party appeared with unexpected representatives, the good faith of that party was questioned. *Id.*

[108] *See id.* at 6-7.

[109] *See id.* at 7-8.

[110] The average time for completion of the mediation process was 67 days, *id.* at 4, while the average processing time for cases outside the mediation project was 293 days in 1994. *See EEOC Struggles with Caseload, supra* note 86.

[111] Supervisors believed that the pilot project added time to the process. *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 6. The report did not recite data that would enable any definitive conclusion on the issue, however. The time from filing to resolution was far shorter for mediated cases, 67 days, than for cases settled outside the pilot project, 247 days. *Id.* However, this difference may be attributable, in whole or in part, to the fact that mediated cases were forwarded to mediation immediately upon agreement of the parties, while the settlement negotiations outside the pilot project "proceeded in accordance with docket order scheduling." *Id.* at 6.

[112] *See id.* at 6.

[113] *See id.* at 5. This raises a question about the value of mediation which will be addressed later.

[114] Information regarding these training sessions was obtained from representatives of the EEOC, Department of Justice, Public Access Section, and the Disability Rights Education and Defense Fund (DREDF). *See also* American Bar Association Commission on Mental and Physical Disability Law and Commission on Legal Problems of the Elderly, *Targeting Disability Needs: An ADA Guide for Dispute Resolution Programs*, at 9 (published by The American Association of Retired Persons for the National Institute for Dispute Resolution December 1993) (hereinafter "*Targeting Disability Needs*"); Equal Employment Opportunity Commission, *Request for Comments on the Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures*, 58 Fed. Reg. 39023 (July 15, 1993).

[115] The 400 individuals trained now comprise the ADA Training and Implementation Network, and are committed to training people with disabilities and employers and other entities in their communities about the ADA. *See* U.S. Equal Employment Opportunity Commission, *Americans with Disabilities Act (ADA) Training and Implementation Network List of Participants* (1993).

In July 1993, the EEOC requested comments from the public about the use of alternative dispute resolution in "1) formal and informal adjudications, 2) rulemakings, 3) enforcement actions, 4) contract administration, and 5) litigation brought by or against the Commission."[118] The Commission sought comments pursuant to its intent to develop a policy statement regarding the use of ADR.[119] The comments generally reflect support for ADR, although many expressed reservations with respect to particular uses of ADR or concerns relating to the way in which ADR might be implemented. While the EEOC staff considered ADR informally in addition to soliciting comments from the public, the long delay in appointing a Chairman for the Commission and other commission members postponed specific consideration and implementation of ADR projects.[120]

In December 1994, the recently appointed Chairman of the Commission announced formation of an ADR Task Force to study and recommend to the Commission appropriate uses of ADR.[121] The task force report led to adoption of four motions relating to ADR on April 25, 1995.[122] The first motion directs the

---

[116] *See* The Community Board Program, Proposal to Demonstrate the Application of Mediation to Achieve Voluntary Compliance with the Americans with Disabilities Act: A National Model (submitted to the Department of Justice, Civil Rights Division May 7, 1993) (hereinafter "Community Board Proposal").

[117] *See* Press Releases from the Department of Justice on the Fourth Anniversary of the ADA detailing voluntary compliance resulting, in part, from ADA training conducted by the Department of Justice and the EEOC.

[118] *EEOC Request for Comments on Alternative Dispute Resolution*, 1993 Daily Lab. Rep. (BNA) 134 d27 (July 15, 1993).

[119] *See id.*

[120] Information from representatives of the Equal Employment Opportunity Commission. The newly appointed chair of the Commission is interested in ADR and the Commission is now considering expansion of the pilot mediation program and a return to the rapid charge processing system. *See EEOC Chair to Address Agency Problems*, 147 Lab. Rel. Rep. (BNA) 404, 405 (November 28, 1994); *EEOC Said to Have to Expand Role of ADR*, 147 Lab. Rel. Rep. (BNA) 214, 215 (October 17, 1994) (EEOC Commissioner Silberman supports expanded ADR).

[121] *See* Report and Recommendations of the Commission on the Future of Worker-Management Relations, reprinted in 1995 Daily Lab. Rep. (BNA) 6, d55 (available on Lexis) (January 10, 1995) (hereinafter "Dunlop Commission Final Report").

[122] *See* Kevin P. McGowan, EEOC Votes to Offer Voluntary Mediation as Option in Job Discrimination Claims, 1995 Daily Lab. Rep. (BNA) 80 (April 26, 1995).

Chairman to take actions necessary to develop an ADR program with the following elements: 1) informed and voluntary participation; 2) confidential deliberations in the ADR process; and 3) use of neutral facilitators.[123] The Office of Legal Counsel was directed to draft a proposed policy statement on ADR by May 30, 1995, for consideration by the Commission.[124] The policy statement should reflect the "basic principles and conclusions of the ADR Task Force Report: that ADR furthers the EEOC's dual mission of vigorously enforcing federal laws prohibiting employment discrimination and resolving employment disputes."[125] When the policy statement is approved, the Chairman will request proposals from EEOC district offices desiring to participate in the ADR program and will select proposals for implementation, giving priority to mediation proposals.[126] The target date for implementation is fiscal year 1996.[127]

The fourth motion directs the Legal Counsel to prepare and submit a proposed policy statement supporting employer efforts to develop voluntary internal ADR programs, reiterating the Commission's opposition to conditioning employment on agreement to mandatory binding arbitration of discrimination disputes and confirming the Commission's determination to accept and process charges regardless of any employer-sponsored ADR program.[128] The contemplated ADR program applies broadly to cases within the EEOC's jurisdiction, including ADA cases, and includes monitoring and enforcement by the EEOC.[129]

Chairman Casellas has begun implementation of the ADR program, issuing various directives pursuant to the Commission's action.[130] He has directed consultation with "internal and external stakeholders" for assistance in developing and implementing the programs.[131] Casellas requested that District Directors contact dispute resolutions organizations, bar associations, colleges and universities, and other organizations to determine the availability and cost of qualified mediators, and particularly whether pro bono services are available.[132] He has solicited both plans for training agency personnel and outside mediators, and development of educational materials about ADR for agency personnel, charging parties, respondents and the general public.[133] Casellas is also exploring the feasibility of hiring ADR coordinators in each district office.[134] Thus, the EEOC is now moving rapidly to institute an ADR program.

---

[123] *See Motions Proposed by the ADR Task Force,* Commission Meeting of the Task Force on Alternative Dispute Resolution, Motion 1 (April 25, 1995) (hereinafter "Motions").

[124] *See id.*

[125] *Motions, supra* note 124, Motion 2.

[126] *See* McGowan, *supra* note 123.

[127] *See id.*

[128] *See Motions, supra* note 124, Motion 4.

[129] *See* McGowan, *supra* note 123.

[130] *See* Motions on Alternative Dispute Resolution Adopted by EEOC April 25, 1995, 1995 Daily Lab. Rep. 80, d28 (April 26, 1995) (available on Lexis).

[131] *See id.*

[132] *See id.*

In addition to the ADR recommendations, the EEOC adopted other recommendations to improve the charge processing system in April 1995.[135] These recommendations include adopting a more flexible approach to charge processing, which prioritizes charges based on the level of investigation necessary; developing a National Enforcement Plan that identifies priority issues and guides enforcement; eliminating detailed "no cause" letters when discrimination is not found; encouraging settlement at all stages of the process; and delegating litigation decisions in individual disparate treatment cases under Title VII and the ADEA to the General Counsel.[136] Like the ADR procedures, these changes are designed to speed case processing and reduce the existing backlog.

B. Titles II and III

1. Department of Justice

The Department of Justice, which has only seventy-five staff members to handle its ADA enforcement responsibilities under Titles I, II and III,[137] also is overwhelmed with cases.[138] As of September 1994, 2902 complaints alleging violations of Title II had been filed, and for 1326 of the complaints, the Department of Justice was the investigating agency.[139] For the same time period, 2796 complaints alleging violations of Title III had been filed, and the Department of Justice opened an investigation in 1634 of those.[140] The Department of Justice has resolved 100 Title II cases informally, 22 cases through formal settlement agreements, and issued 33 letters of findings, four of which found noncompliance.[141] As of September 1994, the department had completed 300 investigations of Title III cases and 177 cases were resolved with increased accessibility.[142] BNA's Americans with Disabilities Act Cases reported 37 judicial decisions in Title II cases and 25 in Title III cases through mid-1994.[143]

---

[133] *See id.*

[134] *See id.*

[135] *See* Equal Employment Opportunity Commission, EEOC Commissioners Adopt Task Force Recommendations to Strengthen and Streamline Agency Charge Processing Systems, News Release, (April 21, 1995).

[136] *See id.*

[137] Meeting with representatives of the Department of Justice, Public Access Section, March 28, 1994. According to Justice, there are approximately fifty ADA staff members in the Public Access Section, twenty in Coordination and Review, and five in Employment Litigation, all within the Civil Rights Division. President Clinton's 1995 budget provides for twenty-one additional staff members. Illustrative of the scope of Justice's responsibilities is that there are approximately 30,000 government bodies covered by Title II alone. Effective March 1, 1995, the ADA functions of the Department of Justice were reorganized and centralized into the Disability Rights Section. Letter from John Wodatch, Chief, Public Access Section, Civil Rights Division, Department of Justice, February 22, 1995; Telephone conversation with Eve Hill, Disability Rights Section, Department of Justice, March 9, 1995.

[138] As of April 1994, about 4000 complaints had been filed with the Department of Justice. The MacNeil/Lehrer NewsHour, Transcript #4899 (April 4, 1994), Interview with John Wodatch (available on Lexis). Fifteen lawsuits have been filed and 200 investigations had concluded with voluntary settlements as of that time. *Id.*

From January 26, 1992 through fiscal year 1993 which ended October 1, 1993, 1669 complaints were filed with the Department of Justice alleging violations of Title II. *See* U. S. Department of Justice, Civil Rights Division, Coordination and Review Section, *Status Report, Enforcement of the Americans with Disabilities Act Title II* 2 (October 1993). A number of these complaints were referred to other federal agencies for investigation as provided by the regulations. *Id.*

While there is no specific time period for case processing under Titles II and III, individuals are not required to exhaust administrative remedies under these titles. Thus any delays in investigation due to the number of cases do not preclude a complaining party from filing suit. Nevertheless, when parties wait long periods of time for agency action, even where not required to do so, the effectiveness of the statute is reduced. Respondents are not relieved of the threat of litigation where cases are not meritorious, nor is rapid resolution of meritorious cases accomplished. Furthermore, individuals who do not have the resources to undertake private actions are injured by the delay.

With respect to ADR, the Department of Justice, like the EEOC, attempts to settle cases informally through negotiation. In addition, the Department of Justice has funded a pilot mediation project through a grant to the Community Board Program in San Francisco.[144] The project utilizes private mediators trained in ADA mediation in five targeted cities, and anticipates mediation of 200 cases.[145] Cases are referred to the mediators by the Department of Justice upon agreement of the parties. The Community Board Program will perform an analysis to determine whether mediation is an appropriate tool for resolution of cases under Title III, focusing on successful resolution of cases mediated, the maintenance of the mediated agreements, and qualitative assessments of both the process and outcomes based on information supplied by Department of Justice personnel, mediation program directors, and mediation participants.[146] Final data will not be available until late 1995.

---

[139] Information from the Department of Justice, Public Access Section.

[140] *Id.*

[141] *Id.*

[142] *Id.* The resolutions include formal and informal settlements, consent decrees, and litigation.

[143] *See ADA: Americans with Disabilities Act of 1990 Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, at 10 (August 1, 1994).

[144] *See* Community Board Proposal, supra note 117, at 4, 6; Targeting Disability Needs, *supra* note 115, at 42.

[145] *See* Community Board Proposal, supra note 117, at 2, 3, 4; Targeting Disability Needs, *supra* note 115, at 42.

Interim analysis of the project reveals some difficulties in execution.[147] Referrals of cases are limited by the geographic area in which the project is taking place. As a result of the geographic limit and the failure of the parties in many of the referred cases to agree to mediation, few mediations have occurred. The Department's initial practice was to close the cases referred to mediation, indicating to the parties that the Department would take no further action on the case.[148] This practice, which since has been changed, may have contributed to the reluctance of respondents to agree to mediation by appearing to remove the threat of government action.[149] Some complainants are also reluctant to mediate, preferring to have the Department handle the case rather than becoming extensively involved in the process. The contractor has been unable to educate potential parties about the benefits of mediation because of limitations in the Privacy Act on releasing their identities without agreement.

The Department of Justice recently awarded an additional grant for an ADA education and pilot project for professional mediators.[150] The goal of the grant program is "to train a select number of professional mediators nationwide about Title III of the ADA, refer Title III cases to these mediators for mediation, monitor the outcome of mediation efforts, and evaluate and disseminate the evaluation of the project to mediators and other interested parties nationwide, so that the project can be effectively replicated in other areas of the country."[151] The project will train 90 professional mediators on the ADA and develop a procedure for referring ADA complaints to the mediators.[152] In addition, a consumer guide to mediation services and a mediator's guide to mediating ADA complaints will be produced. The grantee anticipates mediating 650 complaints.

---

[146] *See Community Board Proposal, supra* note 117, at 7-8. The Department of Justice decided to limit mediation under the grant to Title III cases because it would be easier to evaluate a limited pilot. In addition, Title II cases frequently are more complex, and often more expensive because they involve an entire government entity as the defendant. Meeting with Department of Justice, and telephone conversation with Department of Justice representatives.

[147] Data regarding the initial results of the mediation project were received from the Department of Justice, Public Access Section, Meeting, September 27, 1994.

[148] Meeting with Department of Justice, September 27, 1994. The Department did retain the ability to open the case for investigation if mediation failed. Letter from John L. Wodatch, February 22, 1995.

[149] As a result of interim analysis of the program, the Department has decided to keep cases open pending mediation and evaluate whether to pursue an investigation after mediation has been completed. Letter from John L. Wodatch, February 22, 1995.

[150] *See* 59 Fed. Reg. 29160, 29165 (June 3, 1994) (request for proposal); Department of Justice, *Justice Department Awards 10 Grants to Promote the Americans with Disabilities Act* at 3, October 5, 1994 (press release announcing the grant award to the Key Bridge Foundation).

[151] *See* 59 Fed. Reg. at 29165. The Department of Justice has not ruled out mediation of Title II cases under this grant, and may refer some Title II cases to mediation. Telephone conversation with Department of Justice representative, March 9, 1995.

[152] All information regarding the grant comes from the press release, *supra* note 136, at 3.

The Civil Rights Division of the Department of Justice has been reorganized since the appointment of a new Assistant Attorney General for Civil Rights.[153] Further plans regarding ADA enforcement and the use of ADR await completion of a strategic plan for the Division.[154]

2. Department of Transportation

In addition to issuing regulations regarding transportation,[155] the Department of Transportation handles Title II complaints involving transportation. Complaints regarding transit agencies are handled by the Federal Transit Administration ("FTA"), while the Federal Highway Administration ("FHWA") handles complaints relating to roads and highways.[156] The FTA investigates complaints received and notifies the complainant whether it finds a violation of the statute.[157] If a violation is found, the FTA requires the transit agency to establish a remedial plan. If the agency fails to do so, the FTA can refer the case to Justice for litigation or, where the agency is a recipient of federal funds, seek to terminate funding under Section 504 of the Rehabilitation Act. An action to terminate funding requires a hearing before an administrative law judge.[158]

In its compliance process, the Department of Transportation attempts to resolve disputes informally.[159] The Federal Transit Administration has established a specific informal compliance process for complementary paratransit service and key station accessibility.[160] Once the FTA has determined that it has reasonable cause to believe that a transit agency is not in compliance with these portions of the ADA, it will attempt to negotiate a voluntary compliance agreement with the agency which will establish a plan for compliance. The FTA then monitors compliance with the plan until compliance with the statute is achieved, and for at least two years thereafter.

---

[153] Information from representatives of the Department of Justice, Public Access Section, Meeting September 27, 1994; Letter from John L. Wodatch, February 22, 1995.

[154] *Id.*

[155] In issuing regulations, the Department of Transportation did not use negotiated rulemaking, but did involve interested groups in the rulemaking process through an advisory commission. Information from the Federal Transit Administration. The Department previously used negotiated rulemaking in issuing regulations under the Air Carrier Access Act, 49 USC App. §1374. Information from the FTA.

[156] Information regarding the complaint procedures was received from the Federal Transit Administration and Federal Highway Administration respectively. *See also* 28 CFR §§35.170 - 35.178.

[157] The FTA has taken the position that an isolated incident of noncompliance with the regulations does not constitute discrimination. *See* 49 CFR Part 37, App. D. This position has resulted in some dissatisfaction among complainants. Information from FTA.

[158] *See* 49 CFR §§27.125, 27.127.

[159] Information regarding compliance procedure received from FTA and FHWA. When the FTA performs an on-site review, which is triggered by multiple complaints at one transit property, it will meet with disability groups as well as the transit officials and attempt to achieve informal resolution of compliance disputes.

[160] *See* Federal Transit Administration, Office of Civil Rights, Informal Compliance Process.

The Federal Highway Administration handles complaints relating to roads and highways.[161] The complaints are forwarded to the field offices for investigation, where warranted. Complaints against subrecipients[162] are referred to recipients for investigation since recipients are required to have a complaint procedure by Title VI of the Civil Rights Act of 1964. Where possible, complaints will be resolved informally by agreement with the entity charged with a violation. Where a recipient or subrecipient of federal funds is involved, the FHWA has the ultimate sanction of funding termination for noncompliance. Prior to taking such action, however, the FHWA must attempt to resolve the complaint through negotiation. Complaints against nonrecipients which are not resolved must be referred to the Department of Justice for litigation where warranted. The FHWA anticipates that most valid complaints under the ADA will be resolved informally, like complaints under other civil rights statutes have been resolved. The FHWA has provided training and information to state and local highway administrations and Indian tribal governments regarding the ADA and anticipates additional training, including information about ADR.

The Department of Transportation has limited staff to handle ADA complaints.[163] There are only five professional employees involved in compliance activities at the Federal Transit Administration.[164] The Federal Highway Administration received no additional staff to handle ADA responsibilities and there are no employees working exclusively on ADA matters.[165] Since the effective date of the statute, the FTA has received about 380 complaints under Title II.[166] About 290 complaints are still pending.[167] The Federal Highway Administration has received about 180 complaints, the investigations of which are currently pending in the field offices.[168]

---

[161] Information regarding the complaint process and training from Edward W. Morris, Jr., Director, Office of Civil Rights, FHWA, unless otherwise indicated.

[162] "Recipients" refers to entities that receive federal funding directly. Subrecipients receive such funding indirectly through a recipient. *See* 49 CFR §27.5.

[163] The Federal Transit Administration and the Federal Highway Administration are the two agencies within the Department of Transportation with significant ADA responsibilities.

[164] Information from the FTA.

[165] Information from the FHWA.

[166] Information from the FTA.

[167] *Id.* as of September 1994.

[168] Data from FHWA as of September 1994. This number does not include complaints relating to driver licensing which also come under the jurisdiction of the Federal Highway Administration. *Id.*

C. Title IV

The Federal Communications Commission ("FCC") had received only six complaints of ADA violations as of September 1, 1994.[169] Four involved intrastate communication and therefore, were forwarded to the appropriate state for resolution. All were resolved within 180 days. One complaint involved interstate communication and that was resolved by final order of the Commission. The final complaint, which involves a petition for decertification of an entire state program, is still pending before the agency.[170] The FCC has not yet gathered data regarding complaints filed directly with the states and resolved by the states, but plans to do so in the future. The FCC is open to using ADR procedures in ADA matters, but has not yet done so. The Commission has adopted an "Initial Policy Statement and Order" encouraging the use of alternative dispute resolution[171] and has used negotiated rulemaking with some success in other areas. A staff member in the agency's General Counsel's office is trained in ADR and provides training for other FCC personnel as needed.

D. Summary of Existing Dispute Resolution

Congress clearly contemplated judicial litigation as the primary enforcement mechanism under the ADA. In the more than two years since the effective date of the statute, few cases have been litigated relative to the number of complaints filed, however. There are several explanations for this result. Under Title I exhaustion of administrative remedies is required and, given the EEOC's backlog, most complaints remain in the investigatory stage. While a complainant can request a right to sue letter before completion of the investigation, many complainants clearly have not done so, either because of lack of knowledge of the possibility or because they do not have the legal representation and resources to file suit. Many Title II and III complainants also are apparently waiting for the investigating agency to act, although not required to do so.[172]

A further explanation for the limited number of litigated cases may be the crowded trial dockets of the district courts, delaying decisions in those cases that have been filed. In addition, the enforcement agencies do not have the resources to litigate more than a small number of ADA cases.[173] Congress certainly contemplated a high level of voluntary compliance resulting from the litigation of a small number of cases by the agencies.[174] More time for assessment is necessary before determining whether that result will be achieved. Some informal resolutions are occurring as contemplated by the statute, but again, the number is not large in comparison to the number of complaints filed.

---

[169] Except where otherwise noted, all information regarding FCC complaints was provided by the Federal Communications Commission, Common Carrier Bureau.

[170] *See* 47 USC §225(f).

[171] *See* 47 CFR §1.18.

[172] Unlike the first three titles of the statute, Title IV has not generated a large number of complaints and those filed have been resolved in a timely manner.

[173] Under Title III, the Attorney General is directed to litigate cases involving a pattern and practice of discrimination or issues of general public importance. 42 USC §12188(b)1)(B).

With respect to the alternative dispute resolution methods encouraged by the statute, their use thus far is limited. All agencies appear to be using negotiations to settle cases and achieve compliance. Three pilot mediation projects have been undertaken, one completed, one in process, and a third just beginning. Further use of alternative dispute resolution may occur, but consideration and implementation have been delayed by changes and contemplated changes at the enforcement agencies.

Evaluation of the effectiveness of dispute resolution under the statute must be made in light of these existing enforcement efforts.

IV. Alternatives to Existing Dispute Resolution Methods

With the exception of Title IV cases, a primary problem with existing dispute resolution mechanisms is the large backlog of cases at the investigative stage. Any change in dispute resolution procedures should have, as one of its goals, a reduction in the investigative delays. Another goal should be effective enforcement of the statute.[175] In addition, a third goal would be quicker and more efficient resolution of disputes, which includes cost effectiveness and preferably actual reduction in costs for the government and the parties. While no one change may achieve all of these goals, any proposed change should be tested against them.[176]

---

[174] The technical assistance provisions of the statute evidence Congress' belief in voluntary compliance. *See* 42 USC §12206; S. Rep. No. 116, *supra* note 5, at 43.

[175] *See infra* notes 232-33 and accompanying text for a discussion of values encompassed in the goal of effective enforcement, including justice, statutory intent, procedural fairness, and finality and enforceability of result.

[176] While the focus of this report is the administrative process, resolution of disputes in the administrative process will assist in reducing judicial backlogs. In recent years, employment discrimination cases have increased at a rate several times faster than the remainder of the civil caseload in the federal courts. *See* John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991); Dunlop Commission Fact Finding Report, *supra* note 100, at 103-04, n.29, Exhibits IV-3, IV-4. These figures predate the ADA which added to the jurisdiction of the federal courts. In 1994, the number of suits brought by the EEOC under the ADA increased significantly. *See EEOC Attorneys Filed 373 Lawsuits in 1994*, 147 Lab. Rel. Rep. (BNA) 538, 539 (December 26, 1994). Reducing the caseload of the federal courts is the goal of the Long Range Planning Committee of the Judicial Conference of the United States, which has recommended, *inter alia*, limiting the right of employment discrimination plaintiffs to file suit. *See Major Changes in Federal Court System Are Urged*, 147 Lab. Rel. Rep. (BNA) 507, 508 (December 19, 1994). The ADR

In enacting the statute, Congress decided to rely on both private and public enforcement. While the administrative agencies are authorized and expected to file enforcement actions in some cases,[177] private enforcement was clearly contemplated as well. By limiting appropriations for ADA enforcement, Congress has placed much of the enforcement burden on individuals with disabilities. A litigation-based approach is costly for an individual, particularly when the potential for monetary recovery is limited.[178] Where the potential recovery is not large, many private attorneys are reluctant to accept cases for litigation.[179] Accordingly, numerous individuals may be relying on the government agencies for litigation assistance which will not be forthcoming. These facts raise the question of whether there is a better enforcement model. In considering this question, it is important to keep in mind that enforcement for Titles I, II and IV is patterned after, and in the cases of Titles I and IV a part of, existing enforcement models.

A. Administrative Litigation

1. The Fair Housing Act System

One possible change would be to create an enforcement mechanism using internal administrative litigation, similar to the current system for enforcement of the Fair Housing Act.[180] As a result of 1988 amendments, spurred by perceived ineffectiveness of the prior enforcement system, the Fair Housing Act contains a comprehensive enforcement mechanism which gives the parties the option of

---

proposals *infra* address this problem indirectly, without limiting plaintiffs' right to a federal forum for redress of discrimination complaints.

[177] With respect to entities that receive federal funds and are thereby subject to Section 504 of the Rehabilitation Act as well as the ADA, in addition to filing suit the government may enforce the statute by suspending or terminating funding or threatening to do so. Most state and local governments and transit agencies fall into this category.

[178] Under Title III, damages are not available in private actions, and punitive damages are not available at all. *See* 42 USC §12188. Compensatory and punitive damages, where appropriate, are available for intentional discrimination under Title I, along with back pay. *See* 42 USC §12117; 42 USC §1981a(a)(2). In reasonable accommodation cases, however, where the employer makes a good faith effort to find an accommodation, damages are not available. 42 USC §1981a(a)(3). It is not clear whether compensatory damages are available in actions under Title II. *See* Coleman v. Zatechka, 824 F. Supp. 1360, 1373 - 74 (D. Neb. 1993). Title II remedies are based on remedies under Section 504 of the Rehabilitation Act and courts have disagreed on whether damages are available under Section 504. *Id. See also* Smith v. Robinson, 468 U.S. 992, 1020 n.24 (1984); Eastman v. Virginia Polytechnic Institute and State University, 939 F.2d 204, 207-09 (4th Cir. 1991).

[179] *See* Clyde Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 141 U. PA. L. REV. 457, 467 (1992).

[180] 42 USC §§3610, 3612, 3613, 3614. The National Labor Relations Act provides a similar enforcement mechanism, but without the election option available in the Fair Housing Act. *See* 29 USC §153, 154, 160.

administrative or judicial litigation.[181] Complaints filed are investigated by the Secretary of Housing and Urban Development ("HUD"), who is required to engage in conciliation efforts.[182] The Secretary determines whether there is reasonable cause to believe that a violation of the Act has occurred, issuing a charge of discrimination in cases of reasonable cause and dismissing the complaint where no reasonable cause is found. After a formal charge of discrimination is issued, either party may elect to have the case adjudicated in federal district court by the Attorney General. If no such election is made, the case proceeds to hearing before an Administrative Law Judge ("ALJ") pursuant to the requirements of the Administrative Procedure Act.

The parties to the administrative hearing are HUD, represented by the Office of General Counsel, and the respondent.[183] The statute requires that the proceedings be expeditious and that both discovery and the hearing process be inexpensive.[184] Discovery is conducted on an expedited basis. The proceedings are less formal than a trial in federal district court. Decisions of the ALJ are directly reviewable in the Court of Appeals using the substantial evidence standard, and are enforceable in the Court of Appeals as well. In addition, the Secretary has discretion to review the ALJ's decision, although the applicable regulations indicate that such review will be undertaken in extraordinary cases only. Remedies available include compensatory damages, injunctive and other equitable relief, and civil penalties.

The Attorney General retains the authority to bring civil actions in pattern and practice cases and cases that raise general issues of public importance, authority parallel to that in Title III ADA cases. The amendments do not affect an individual's private right of action, which can be filed in federal district court without exhausting administrative remedies. Punitive damages and attorneys fees and costs are available in private actions. A private action cannot be initiated if an administrative proceeding is pending, however.

Evaluations of the enforcement procedures are mixed, although the consensus seems to be that the procedures are an improvement over preexisting enforcement efforts.[185] A primary concern with the FHA process is the backlog of complaints at the investigation stage.[186] While there is a time deadline for investigation of complaints, the time deadline frequently is not met.[187] The FHA caseload is about 6000 per year,[188] much smaller than the EEOC's caseload in Title I cases although larger than that under Titles II and III. The percentage of cause findings is also small, only 3% in 1992, while the percentage of no cause findings is 20%.[189]

---

[181] *See* Leland Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act,* 10, 11, (Administrative Conference of the United States 1992), published at 7 ADMIN. L.J. 59 (1993). Information about the Fair Housing Act amendments was taken from the Ware study unless otherwise noted.

[182] *See id.* at 15. The amendments continue to provide a role for handling of complaints by state and local agencies with rights, procedures and remedies that are substantially equivalent to those under the Fair Housing Act. *Id.*

[183] The complaining party may intervene and be represented by counsel.

[184] Available discovery methods include interrogatories, depositions, requests for production of documents and requests for admissions, and sanctions are provided for failure to cooperate in discovery.

[185] *See* Ware, *supra* note 182, at 30-31; United States Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report,* (September 1994) (hereinafter "CRC

In about 60% of FHA cause cases, at least one party elects litigation in the federal district court.[190] This election has placed a heavy burden on limited resources of the Housing Section of the Justice Department, which has been forced to obtain assistance from local U. S. attorneys.[191] There has been no systematic study of the reasons for the election.[192] Desire for a jury trial, the availability of punitive damages in court, or the attorneys' greater familiarity with the district courts are possible explanations.[193] Cases tried before the ALJs are resolved relatively quickly, however, with seven to seven and one half months from charge to ALJ decision.[194] While punitive damages are available in district court and some large awards have been granted by the courts, damage awards of the ALJs are relatively comparable to those in Department of Justice actions in

---

Enforcement Report"); John P. Relman, *Federal Fair Housing Enforcement Under President Bush: An Assessment at Mid-Term and Recommendations for the Future* in LOST OPPORTUNITIES: THE CIVIL RIGHTS RECORD OF THE BUSH ADMINISTRATION MID-TERM 105-06, 117-18 (Susan M. Liss & William L. Taylor, eds. 1991) (hereinafter "Relman I"); John P. Relman, *Federal Fair Housing Enforcement: The Bush Record and Recommendations for the New Administration* in NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS 92-94 (Susan M. Liss & William L. Taylor, eds. 1993) (hereinafter "Relman II"); *Oversight Hearing*, *supra* note 98, 1994 W.L. 386287 at 13 (July 26, 1994) (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs); Information from Judge Alan Heifetz, Chief Administrative Law Judge, Department of Housing and Urban Development (Judge Heifetz' analysis is reported *infra)*.

[186] *See* Ware, *supra* note 182, at 28-30; Relman I, *supra* note 186, at 14; Relman II, *supra* note 186, at 88; CRC Enforcement Report, *supra* note 186, at 223.

[187] *Oversight Hearing*, *supra* note 98, 1994 W.L. 386287 at 10-11; Relman II, *supra* note 186, at 88; Ware, *supra* note 182, at 28.

[188] Information from Judge Heifetz; Relman II, *supra* note 186, at 88 (4,457 cases in 1990).

[189] *Oversight Hearing*, *supra* note 98, 1994 W.L. 386287, at 13. A large number of cases have been administratively closed, leading to criticism of HUD's enforcement. *See* Relman II, *supra* note 186, at 88. Administrative closure occurs where the complaint is withdrawn, the complainant cannot be located, or HUD has no jurisdiction. *Id.* The EEOC has been similarly criticized. *See Oversight Hearing*, *supra* note 98, 1994 W.L. 388816 at 4 (Testimony of Alfred W. Blumrosen).

[190] Information from Judge Heifetz.

[191] *See Oversight Hearing*, *supra* note 98, 1994 W.L. 386287, at 15; Relman II, *supra* note 186, at 9.

[192] *See* CRC Enforcement Report, *supra* note 186, at 232 (recommending such a study).

[193] Information from Judge Heifetz.

[194] Information from Judge Heifetz; *Oversight Hearing*, *supra* note 98, 1994 W.L. 386287 at 16; Relman II, *supra* note 186, at 88.

federal courts.[195] Larger damage awards have been obtained in private actions than in Department of Justice actions in the federal courts or in ALJ decisions.[196]

2. Analysis of Administrative Litigation

Use of ALJs provides certain advantages. A corps of ALJs dedicated to ADA cases has the potential to develop a level of expertise in the subject matter that federal judges may be unable to develop because of the wide range of cases that are within their jurisdiction.[197] A consistent interpretive body of law might develop more quickly than in the diverse federal courts.[198] ALJs working in the same subject area have the opportunity to consult with one another and discuss difficult issues of law in a collegial atmosphere, which should improve consistency and quality of decisionmaking.[199] In a system that provides for optional administrative litigation, however, two bodies of law are developing, one in the courts and one in the administrative body. These two bodies of law may or may not be consistent. Moreover, the administrative determinations may have less precedential import,[200] hindering the goal of development of the law, which is particularly important for a relatively new statute.

---

[195] Information from Judge Heifetz (damage awards relatively comparable); *Oversight Hearing*, *supra* note 98, 1994 W.L. 386287 at 12-13 (although awards not comparable in early years of the ALJ system, the ALJ awards have risen steadily in recent years); CRC Enforcement Report, *supra* note 186, at 61-64 (noting the difficulty of making such comparisons because of the number of variables but concluding generally that damages in the two forums are comparable excluding punitive damages).

[196] *See* Relman II, *supra* note 186, at 88, 91.

[197] Information from Judge Heifetz. The advantage of expertise might be offset by the cost to establish and administer the ALJ system and concerns about impartiality when ALJs are hearing cases that arise from the agency in which they work. *See* Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level,* 65 JUDICATURE 266, 274 (1981) (recommending a pilot program to test the idea of a unified group of ALJs hearing various federal administrative cases). Under the ADA, if the ALJs heard cases under various titles, the concern about agency bias might be minimized, but a structure would have to be created to employ ALJs handling cases from various agencies. Such a system has been utilized, pursuant to recommendation of the Administrative Conference of the United States, by the Federal Bank Regulatory Agencies. *See* Recommendation 87-12, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, Vol. 1, at 70 (1987); Michael P. Malloy, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, Vol. 1, at 1216 (1987). For further discussion regarding use of common ALJs to decide cases from various agencies, see Lubbers, *supra*; Jeffrey S. Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. BAR NEWS & J. 383 (1984); Victor W. Palmer & Edwin S. Bernstein, *Establishing Federal Administrative Law Judges as An Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673 (1984); Michel Levant, *A Unified Corps of Administrative Law Judges—The Transition from A Concept to an Eventual Reality*, 6 W. NEW ENG. L. REV. 705 (1984); Norman Zankel, *A Unified Corps of Federal Administrative Law Judges is Not Needed*, 6 W. NEW ENG. L. REV. 723 (1984).

[198] Information from Judge Heifetz. *See* Lubbers, *supra* note 198, at 274; Zankel, *supra* note 198, at 736.

[199] Information from Judge Heifetz. If the corps of ALJs is large, however, because of the volume of cases, consistency may not result. *See* Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 UCLA L. REV. 1055, 1059-60 (1992). Inconsistency is also more likely to be a problem when the cases are largely fact-based. *See id.*

If the experience of HUD ALJs is a guide, speedier resolution might result from an ALJ system.[201] HUD ALJs have successfully used the concept of settlement judges to assist in resolving cases when agreed to by the parties, a process which might be useful in ADA cases also.[202]

The FHA enforcement model might be applied to ADA cases under any or all of the four titles. The FHA model, with its election of enforcement mechanisms, is more appropriate than the model of the National Labor Relations Act, which limits charging parties to the administrative forum and denies them any litigation forum if the General Counsel determines that the complaint has no merit.[203] Since Congress clearly contemplated private enforcement of the ADA and the private right of action preexists any administrative litigation forum, any change eliminating that right seems politically unlikely. Moreover, since other civil rights groups are not limited to an administrative forum, it seems inappropriate to limit individuals with disabilities. Also, in cases where punitive and compensatory damages are available, such as intentional discrimination cases under Title I, the constitutionality of restriction of litigation to the administrative forum is questionable.[204] Additionally, the low rate of cause findings by the EEOC makes that agency more analogous to HUD than to the NLRB.[205]

---

[200] *See* Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 562 (1987).

[201] *See* Ware, *supra* note 186, at 28. Although HUD ALJs have a record of speedier decisions than the courts, an ALJ system does not guarantee quicker decisions. The Social Security hearing process is marked by long delays and there are concerns about delays in decisionmaking by NLRB ALJs as well. *See Oversight Hearing*, *supra* note 98, 1994 WL 386246 at 3 (Testimony of Janice Goodman).

[202] Information from Judge Heifetz. The use of settlement judges is a form of ADR in which an ALJ other than the one assigned to try a case meets with the parties to help them resolve the dispute. *See* Administrative Conference of the United States, Recommendation 88-5, *Agency Use of Settlement Judges*, in RECOMMENDATIONS AND REPORTS 21-28 (1988); Daniel Joseph & Michelle L. Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 282, 292 (1988); Morell E. Mullins, *Alternative Dispute Resolution and the Occupational Safety and Health Review Commission: Settlement Judges and Simplified Proceedings*, 5 ADMIN. L. J. 555, 560-61 (1991). The settlement judge may increase the prospects of settlement by previewing the case, i.e. pointing out the strengths and weaknesses of each party's position, based on his or her judicial expertise. *See id.*; Joseph & Gilbert, *supra* at 296-97.

[203] *See* 29 USC §160; Vaca v. Sipes, 386 U.S. 171, 182 (1967). *But see Oversight Hearing*, *supra* note 98, 1994 W.L. 386267 at 5-6 (Testimony of Lawrence Z. Lorber, recommending an NLRB-type system for discrimination claims).

[204] *See* Ware, *supra* note 182, at 13-14 and sources cited therein for a discussion of the constitutional issues raised by eliminating the right to jury trial in an action for damages. The concern for constitutionality led to the compromise of an optional administrative litigation in the FHA. *Id.*

[205] In fiscal 1992, the EEOC found cause in 2.4% of cases, while finding no reasonable cause in about 61%. *See EEOC's Performance in Handling Caseload Criticized by Witnesses at House Hearing*, 1993 Daily Lab. Rep. (BNA) 143 d3 (July 28, 1993). Other data indicate that between 1989

At this point in time, there is little reason to consider altering the dispute resolution mechanism under Title IV. The number of complaints has been extremely low and they are handled efficiently through the existing complaint resolution mechanism of the FCC. While the FCC's administration of the statute has not proceeded without criticism, the primary focus of the criticism has not been dispute resolution.[206] Provision of an alternative administrative enforcement mechanism for cases under Titles I, II and III merits further consideration, however.[207]

In considering administrative litigation, one question that arises is whether a common corps of ALJs should be used for cases arising under the three titles. Use of separate groups for cases under each title would increase the administrative costs,[208] but permit more agency supervision over the ALJs.[209] Given the overlap in types of cases and in certain issues, a common group of ALJs is a sensible approach, if ALJs are used.[210] Title II cases will frequently involve common issues with Title I and Title III cases, such as employment discrimination or access to buildings and programs.[211] Moreover, knowledge about various disabilities and their effects, and accommodations that can be made to enable individuals with such disabilities to participate fully in society transcends all the titles. Development of expertise in these areas is one advantage of an ALJ system.

---

and 1993, in cases where the EEOC made a cause finding, 95% were "no cause" while only 5% were "cause." *See Oversight Hearing, supra* note 98, 1994 WL 388816 at 4. These figures include all cases, and since the ADA became effective in July 1992, the number of ADA cases included in the total is presumably small. In 1990, the NLRB found cause in approximately 43.9% of cases filed against employers and 25.4% of cases filed against unions. Dunlop Commission Fact Finding Report, *supra* note 98, at pp. 81, 83. While the low rate of cause findings may indicate that many nonmeritorious charges are filed with the EEOC, critics of the agency point to the number of "no cause" cases successfully litigated by the charging parties through private counsel. *See Oversight Hearing, supra* note 98, 1994 WL 388816 at 4.

[206] *See* Karen Peltz Strauss, *The Right to Effective Communication: Civil Rights of Persons Who Are Deaf and Hard of Hearing* in NEW OPPORTUNITIES, *supra* note 186, note at 146-48.

[207] In cases where both the ADA and the Rehabilitation Act apply, a hearing before an ALJ is required in any event prior to termination of federal funding under the Rehabilitation Act. *See* 49 CFR §§27.125, 27.127.

[208] Use of a combined group of ALJs would save on administrative costs. *See* Palmer & Bernstein, *supra* note 198, at 686, 702.

[209] Whether agency supervision is an advantage or a disadvantage is a matter for debate. See Malcolm C. Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. NEW ENG. L. REV. 643, 646-49 (1984); Palmer & Bernstein, *supra* note 198, at 693-703; Zankel, *supra* note 198, at 733-35, 742.

[210] The ALJ pool used by the federal bank regulatory agencies could serve as a model. *See* Recommendation 87-12, *supra* note 198, at 71, 73.

[211] To the extent that there is a group of cases that is relatively unique, it is transportation cases under Titles II and III.

Establishment of an ALJ system would add significant administration costs to the enforcement process.[212] ALJs would have to be hired and an administrative structure would be required to support the system.[213] Overhead costs such as office space and hearing rooms would be necessary, as well as travel costs for the judges from their home base to the hearing locations.[214] Costs would also increase if more cases were litigated as a result of the administrative litigation option.[215] These additional costs might be offset in part by a reduction in costs for judicial enforcement.[216] Costs to the parties might be less in an administrative litigation process as a result of the reduced formality of the process.[217] This would benefit the parties, but would reduce agency costs only slightly, certainly not enough to offset the costs of establishing the system.

The HUD model provides for administrative litigation by the HUD General Counsel and judicial litigation by the Department of Justice when there is reasonable cause to believe a violation has occurred. Currently, neither the EEOC nor the Department of Justice is required to litigate a case whenever reasonable cause is found; the agencies can leave the case to private litigation. If the HUD model were followed, additional agency resources would have to be committed to litigation. Such a change would benefit individuals with strong cases that have low dollar value, for those individuals might be unable to find private counsel interested in the case. Additionally, agency litigation permits an individual to take a more limited role in enforcement, which may lead to enforcement in cases where the individual might not pursue the case with private counsel. If so, enforcement would improve.[218] With limited resources, however, litigation of all reasonable cause cases would use agency resources for individual cases that might be better spent on impact litigation involving pattern and practice cases.[219]

---

[212] Because the number of ADA cases potentially subject to administrative litigation greatly exceeds those under the FHA, a larger corps of ALJs would be necessary. As of 1984, the cost to maintain an administrative law judge was $125,000 per year for salary and support. Levant, *supra* note 198, at 712. The cost is certainly significantly larger ten years later.

[213] ALJs are concentrated at the highest federal pay grades, GS-15 and GS-16. *See* Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 62-63 (1979).

[214] The primary costs of an ALJ system are the "payroll, physical facilities and travel." Palmer & Bernstein, *supra* note 198, at 702.

[215] Litigation of additional cases is not necessarily a negative, however, as it may improve enforcement of the statute.

[216] The agency's cost of litigation would increase in an administrative system because the agency must pay for the system or, in the case of common ALJs, a part of the system. While the ADA increased the workload of the federal courts, no additional federal judges were added solely as a result of the ADA.

[217] *See* Silver, *supra* note 201, at 562. As Silver notes, however, costs of litigation are still substantial. *Id.*

[218] If individuals were required to litigate in the administrative forum without agency assistance, the addition of the administrative forum would not increase enforcement activity but might reduce litigation costs slightly and resolve cases more quickly.

A system with several litigation options would have the value of providing alternatives to parties with different preferences regarding dispute resolution. The wider the range of alternatives available, the more likely that parties will be satisfied. Nevertheless provision of alternatives comes at a cost, both to the parties and to the government in a time of shrinking resources and increased pressure to reduce government spending.

The significant resource infusion necessary to create an ALJ system might be better used in other ways, such as reducing the backlog of cases awaiting investigation,[220] increasing the judicial litigation of impact cases, and/or funding an alternative dispute resolution system. Another possible use of such resources would be tax credits to encourage voluntary compliance.

One additional difficulty with altering the ADA's enforcement procedure is that the ADA adopts the enforcement procedures of other statutes. This is particularly problematic with respect to Title I. Creation of an ALJ option for Title I cases would require separation of those cases from employment discrimination cases arising under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. Such separation is not impossible, but it conflicts with the view, strongly held by many, that parity in civil rights claims involving different groups is desirable. Moreover, using the existing system for enforcement achieves some efficiency by using personnel previously trained in employment discrimination cases.[221]

---

[219] For a criticism of agency use of resources for individual cases to the detriment of systemic cases, see *Oversight Hearing, supra* note 98, at 1994 WL 388816 at 4, 5, 15. Litigation of systemic cases may benefit more people with fewer resources. *Id.* at 15. In addition, for legal and financial reasons, the private bar may be less likely to litigate systemic cases, at least without agency support. *Id.*

[220] Addition of an administrative litigation option would have no impact on the substantial backlog of cases at the investigation stage.

[221] There is currently widespread concern over the enforcement problems in employment discrimination cases as a whole, and Congressional oversight hearings are ongoing. *See Oversight Hearing, supra* note 98. Some critics of the existing enforcement scheme have recommended an ALJ system for employment discrimination cases. *See Oversight Hearings, supra* note 98, 1994 WL 388816, at 11-13. For a view opposed to an ALJ system for the EEOC, see *Oversight Hearing, supra* note 98, 1994 WL 386246 at 1-4. The Dunlop Commission also is considering related issues, particularly whether there should be a specialized tribunal for workplace disputes and whether more integrated agency administration is appropriate. *See* Dunlop Commission Fact Finding Report, *supra* note 98, at 113-14. Consideration of such changes is beyond the scope of this study, but given the current structure of the ADA, any enforcement change under Title VII will directly affect Title I enforcement. Accordingly, the issues addressed here are directly impacted by consideration of changes in employment discrimination enforcement as a whole.

When Title VII was enacted, an enforcement model based on the NLRB system was initially contemplated but Congress rejected the model for enforcement through the federal courts. *Oversight Hearing, supra* note 98, 1994 WL 386278 at 2 (Testimony of David L. Rose). Efforts to amend the statute to provide for EEOC internal enforcement authority were rejected in 1972. *See id.* Among the

Testing the adoption of an administrative litigation option against the goals of any change in dispute resolution procedure recited earlier leads to the conclusion that the benefits may not justify the allocation of resources necessary for the system. The change would not impact the investigation backlog. It would impact effective enforcement of the statute only if more valid cases are litigated due to the change, thus reducing discrimination. The change should provide an option for resolution which is quicker and perhaps less expensive for the parties. The cost to the government would be significant, however. As will be demonstrated in the remainder of the report, a more effective use of these resources would be increased government litigation, combined with mediation which will be more effective with a realistic threat of litigation.

B. Early Intervention Programs

Another possible change in the dispute resolution mechanisms under the ADA is implementation of an early intervention program similar to the system used by the EEOC during the Carter administration.[222] Analysis of that program and several other early intervention programs will assist in determining whether such a system would be useful for ADA cases.

1. The Rapid Charge Processing System

In the late 1970s, the EEOC implemented the rapid charge process ("RCP"), which required Commission staff to conduct a limited preliminary investigation of charges filed and then schedule a fact finding conference with both parties.[223] The EEOC representative served as a moderator/advisor, with the goal of encouraging settlement. The settlement, if reached, was embodied in an agreement signed by the parties and the EEOC. If no settlement was reached, the evidence from the investigation and the conference was used to make a determination of cause. If the evidence was insufficient for such a determination, the case was returned to the investigation process. A General Accounting Office report found that the system improved charge processing, and was effective.[224]

---

reasons for rejection were concerns on the part of employers that the agency would exhibit pro-plaintiff bias. *See* H. R. Rep. 88-914, 88th Cong., 2d Sess., at 293 (1964).

[222] This system, as constructed at the EEOC in the late 1970s, is a form of alternative dispute resolution.

[223] The system is described in EEOC Request for Comments, *supra* note 115, at 39023. In addition to using the system itself, the EEOC encouraged state and local agencies which had work-sharing agreements with the EEOC to use similar procedures, and many did so. *See* Project on Equal Education Rights, NOW Legal Defense and Education Fund & SRI International, *The Settlement Solution: Assessing Mediation as A Tool in the Enforcement of Civil Rights* 7-8 (1980) (hereinafter "PEER Study").

[224] *See id.*

However, the report criticized the EEOC both for obtaining settlements in cases without a reasonable basis to believe the charge was meritorious and for accepting settlements with little substance.[225]

2. Washington Field Office Program

The rapid charge processing system was abandoned with the change in administrations, but recently a pilot program in the EEOC's Washington Office has revived some of the features of the system.[226] The system, entitled "Washington Field Office Charge Assessment, Planning and Resolution System," operates through initial assessment of the merits of a charge at the intake step of the procedure. The charge is coded at that time and the code, which reflects the assessment of the merits, indicates the method of additional processing. Cases with no evidence of discrimination are investigated only through a letter to the Respondent requesting its position and supporting documentation. If the evidence of the Respondent accords with the charging party's evidence, the case is closed with a no cause determination after an interview with the charging party.

In cases that appear stronger on intake, the agency makes early settlement efforts. Very strong cases are discussed bimonthly with the legal department in order to develop the evidence necessary for a cause determination. Settlement efforts are made in those cases as well.

Evaluation of the system established that upon implementation of the system, average processing time for cases decreased and cause findings increased. The settlement rate varied, decreasing in 1994.[227] Evidence regarding the impact on protected groups was mixed. With respect to ADA cases, more were rated meritorious than their percentage in the system would suggest, but, nationally, "merit resolutions"[228] ADA cases handled by the EEOC exceed merit resolutions of all cases.

The Washington Field Office Director's assessment of the program is positive, but the Director recommends more structure in the settlement program. She also suggests that, absent settlement, cases assessed as low merit should be dismissed quickly with a right to sue letter indicating "insufficient evidence" or "cessation of administrative process" rather than no cause. Such a system would allow the agency to concentrate investigative resources on cases more likely to be meritorious, while not precluding plaintiffs in other cases from filing suit.

---

[225] *See* Silver, *supra* note 201, at 543, citing Comptroller General, Further Improvements Needed in EEOC Enforcement Activities 11-19 (1981).

[226] This description of the program is taken from *Oversight Hearing, supra* note 98, 1994 WL 386284 (Testimony of Susan Buckingham Reilly, Washington Field Office Director).

[227] Processing time also increased in 1994, but not to the level that preceded implementation of the system. The assessment of the Field Office Director is that processing time increased because of staff turnover and concentration on some of the oldest cases.

[228] Merit resolutions include settlements, determinations of cause, and withdrawals of cases where the charging party receives benefits.

3. Office of Civil Rights Program

The Office of Civil Rights ("OCR") for the Department of Education, which is responsible for enforcing Title VI of the 1964 Civil Rights Act,[229] also has utilized an early intervention program. OCR's complaint processing system includes a voluntary procedure known as early complaint resolution ("ECR"), which enables the recipient of federal funds and the complainant to attempt to resolve their dispute. An agency investigator serves as a mediator in the process, which occurs prior to investigation and regardless of whether there is a civil rights violation. Unlike the EEOC's Rapid Charge Processing system, the OCR process is separate from the investigation. If ECR is unsuccessful, the case is assigned to a different investigator and nothing in the process becomes part of the investigation. Additionally, any settlement agreement reached requires the complainant to withdraw the complaint. OCR is not a party to any agreement and does not endorse it.

4. Analysis of Early Intervention Programs

These early intervention programs promise, and in some cases deliver, a reduction in the backlog of cases.[230] Cases are disposed of more quickly, which is of value to all parties. And in accord with the axiom, justice delayed may be justice denied. Nevertheless, efficiency is not the only goal of dispute resolution. Other values include justice and statutory intent, procedural fairness, and finality and enforceability of the result.[231] Professor Silver has evaluated EEOC's RCP system and OCR's ECR procedure in light of these values. In assessing justice, she includes norm articulation and substantive fairness along with statutory intent.[232]

Early intervention methods which promote settlement through mediation-like processes have been criticized both because they do not serve the purpose of articulating norms and developing coherent policy and because they focus on ad hoc individual justice, perhaps at the expense of systemic issues.[233] Use of such methods will bring about change for more complainants, but without knowing the merits of the cases, it is difficult to know whether the results effect justice.[234] If the use of early intervention settlements diverts agency attention from systemic problems, then overall results in terms of achieving enforcement objectives *may* be negative.[235] A third criticism is that such programs may cause respondents who have not discriminated to offer concessions to complainants to resolve the dispute.[236] Because the ADA is a relatively new statute, development of norms of statutory interpretation is particularly important. Early intervention may diminish the opportunities for development of the law by effectuating settlements. If the settlements fairly resolve the issues between the parties, however, it is difficult to argue that they should be forced to litigate for purposes of developing the law.

---

[229] Title VI prohibits discrimination based on race, color and national origin by recipients of federal funds. *See* 42 USC §2000d. The Department of Education's responsibilities are limited to discrimination in education. *See* Silver, *supra* note 201, at 487. The discussion of the procedure for the Office of Civil Rights is taken from Silver's article.

[230] Settlement rates at OCR, EEOC and the state agencies studied ranged from 64% to 19.5% with most at the higher end of the range. *See* PEER Study, *supra* note 224, at 47-49.

[231] *See* Silver, *supra* note 201, at 519. These goals enumerated by Silver combine to make up what this report has referred to as effective enforcement of the statute. *See supra* note 176 and accompanying text.

[232] *See id.* at 521-6.

Where the early intervention and settlement occurs without investigation, assessment of whether the settlement is appropriate in light of the goal of eliminating discrimination is problematic.[237] The procedure used by OCR suffers from this weakness.[238] Furthermore, OCR's lack of involvement in approving or participating in the settlement leaves the weaker party in settlement negotiations more vulnerable to sacrificing legitimate positions for little compensation.[239] EEOC's procedure, which is a part of the investigation process, is better in this regard. Procedural fairness is related to the issue of substantive fairness. Certainly the parties should have notice of the process.[240] An additional concern, however, is the possible imbalance of power in settlement negotiations.[241] This may in part be mitigated by providing as much information as possible regarding rights and remedies to the parties, but may be exacerbated by either the presence of counsel for one party and not the other,[242] or by an agency representative who gets credit for settlement.[243]

---

[233] *See id.* at 540. Because these programs incorporate mediative processes, the same criticisms are made of mediation. See further discussion of these issues and evaluation of the mediation alternative *infra.*

[234] *See id.*

[235] *See id.* The PEER Study found that "preparing a case for mediation tends to discard either the opportunity to identify class or systemic issues or the opportunity to pursue them when known." *See* PEER Study, *supra* note 224, at 128. Where mediation was used, the intake interviewer commonly convinced the complainant to eliminate class allegations and focus on individual complaints to facilitate mediation. *Id.* at 127. In addition, it is difficult to mediate class cases because the agencies do not have the means to identify and notify class members. *Id.* As a result, respondents have little incentive to agree to a class settlement since the class members will not be bound. *Id.* Furthermore, there is little incentive for the agency to raise class issues that might jeopardize settlement. *Id.* at 128.

[236] *See* Silver, *supra* note 201, at 542-43.

[237] *See id.* at 544.

[238] *See id.*; PEER Study, *supra* note 224, at 20.

[239] *See* Silver, *supra* note 201, at 556.

[240] *See id.*

[241] *See id.*

An additional question about the viability of the early intervention procedures is whether they result in enforceable agreements. A settlement agreement fashioned by the parties may be more likely to generate compliance than a judicial decision imposed on the parties.[244] While a written settlement agreement would provide a basis for a common law contract enforcement action, this may not be a satisfactory enforcement option for a charging party, the party most likely to be asserting noncompliance.[245] Agency enforcement is preferable, but courts disagreed on whether the EEOC could enforce agreements reached through rapid charge processing.[246] Instead of attempting to enforce settlement agreements, OCR requires filing of a new complaint, with the time limit for filing calculated from the breach rather than the date of the underlying discrimination.[247] Thus, Silver concluded that the early complaint procedures suffered from the lack of conclusive enforceability.

In addition to the values noted above, the early complaint resolution procedures provided certain other advantages over litigation. Whereas litigation is a winner take all proposition, the early resolution procedures provided an opportunity for each of the parties to achieve some benefit.[248] In addition, the complaint resolution procedures gave the parties substantial control over the process and the outcome.[249] Furthermore, the mediative process may be more conducive to preserving relationships than litigation and the nonconfrontational nature of the process may facilitate settlement at an early stage in the dispute.[250] In sum, the early intervention programs provide both advantages and disadvantages that must be balanced in determining whether their use advances the statutory goals. Because these programs incorporate forms of alternative dispute resolution, they will be considered further in the next section.

The early assessment program undertaken by the Washington Field Office offers some promise of reducing the backlog and speeding case processing. The Department of Justice already operates in similar fashion under Title III as it declines to investigate certain cases. All Title II cases are investigated, however, by the appropriate agency. The drawback of such a system is its potential to ignore valid discrimination claims where the plaintiff is less articulate or less able to identify the evidence of discrimination for the investigator or intake officer.[251] Also where a statute is relatively new, with little time for judicial development of the law, it is important not to screen out at an early stage, cases that would develop the law or test innovative theories of legal interpretation. Accordingly, where an early assessment system is adopted, training of the investigators and intake officers to ask appropriate questions and develop evidence in support of alternative legal theories is essential.[252] Given such training, however, the system offers an appropriate way to prioritize cases to allocate limited resources most effectively.

---

[242] *See id.* Most likely, the complainant will be without counsel. *Id.* at 557.

[243] If the agency representative is internally rewarded for settlements, the incentive may be to press for settlement regardless of the merits of the case and the fairness of the settlement for the parties. *See id.* at 556.

[244] Silver, *supra* note 201, at 575.

[245] *See id.* at 575. As Silver notes, the common law action will require significant investment of resources, legal assistance, and time, the absence of which prompted charging party reliance on the agency initially. *Id.*

[246] *See id.* at 576 - 78 and cases cited therein.

[247] *See id.* at 579-80.

[248] *See id.* at 584.

[249] *See id.* at 585-86.

[250] *Id.* at 587-88.

C. Alternative Dispute Resolution

1. The Role of ADR in ADA Cases

Given the statutory encouragement of ADR, it is appropriate to consider whether the agencies are currently using ADR effectively and whether additional use of ADR might contribute to enforcement efforts. Despite the statute's support of ADR, one might question whether ADR has a role to play in ADA disputes, particularly given the nature of the public rights involved.[253] In addition to the dispute resolution function, courts also play a role in establishing norms, a process of giving "meaning to our public values."[254] Critics of ADR argue that it limits this function of the courts.[255] While this is a persuasive reason to maintain litigation as a primary enforcement strategy, it does not justify preclusion of ADR in ADA cases. A large number of ADA cases are backlogged at the investigation stage with potential to be backlogged at the litigation stage in the future. ADR offers some promise of quicker, inexpensive disposition of cases with greater satisfaction on the part of litigants. As persuasively noted by the Pound Conference Report,

---

[251] In some cases, the complainant simply may not have access to the evidence necessary to establish the violation, such as evidence of differential treatment. Applicants for jobs are in particularly difficult positions to obtain such data. The Washington Field Office program appropriately declines to code such cases as "no evidence" cases. *See Oversight Hearing*, *supra* note 98, 1994 WL 386284 at 2.

A second problem is the potential for undue influence on agency personnel in prioritizing cases. Concern has been voiced in recent years over close relationships between personnel of regulatory agencies and the entities being regulated. *See* Edna Earle Vass Johnson, *Agency "Capture": The "Revolving Door" Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95 (1983). Without suggesting any lack of integrity on the part of government officials, at any point in governmental processes where discretion must be exercised, the possibility of pressure from the regulated entity exists.

[252] The questions to be asked at the investigatory and intake stages need to be developed with the advice of agency lawyers.

[253] Some commentators have argued that ADR is inappropriate in cases involving significant public rights. *See* Henry J. Brown & Arthur L. Marriott, ADR PRINCIPLES AND PRACTICE 396 (1993); Irving R. Kaufman, *Reform for A System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 29 (1990). *See also* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L. J. 1187 (1993) (arguing that the public justice values underlying discrimination statutes are best preserved by de novo review of arbitral determinations of law in discrimination cases).

> [t]he ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it.[256]

Agency efforts at alternative dispute resolution thus far have concentrated on settlement negotiation and mediation. Both offer potential for effective resolution of ADA disputes.[257] Given the large number of complaints, settlement, accomplished with or without mediation, is essential for effective enforcement of the statute.[258] Nevertheless, as noted, caution must be used in adopting ADR techniques because of the need for judicial development of the law. In selecting cases for litigation and settlement, agencies must balance the interests of establishing the law and achieving benefits for victims of discrimination. This can be done through development of enforcement policies by the agencies and ensuring that decisions regarding settlement and litigation are made in accordance with established priorities.[259] These concerns must be salient in establishing mediation policies.

---

[254] Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979). *See also* Daniel Misteravich, *The Limits of Alternative Dispute Resolution: Preserving the Judicial Function*, 70 U. DET. MERCY L. REV. 37, 39-40 (1992).

[255] *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72 (1986); Kaufman, *supra* note 254, at 30. As suggested by Kaufman, resolutions through ADR have no greater impact on this function than settlements reached through other mechanisms. *See id.* at 29-30.

[256] National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, The Pound Conference: Perspectives on Justice in the Future 300 (1979), quoted in Kaufman, *supra* note 254, at 37. The mediation proposal herein will not unduly interfere with the law development function. *See infra* notes 293-95 and accompanying text.

[257] Sander and Goldberg suggest a rule of presumptive mediation, i.e. that mediation should be the first ADR method of choice to promote settlement since it offers such potential for resolving disputes. *See* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 59 (1994). According to Sander and Goldberg mediation has the greatest potential for overcoming obstacles to settlement except differing views of facts and law and a plaintiff's belief that he or she may obtain a jackpot recovery. *See id.* They further suggest that a skilled mediator often can achieve settlement without resolving disputes over factual and legal questions. *See id.*

[258] "Settlements are the lifeblood of equal opportunity law." *Oversight Hearing*, *supra* note 98, 1994 W.L. 388816 at 4.

The pilot mediation projects and the Department of Justice grant for mediator training are steps in the right direction. Mediation is appropriate for ADA cases for a number of reasons.[260] As noted, settlement of cases is an essential part of the enforcement effort as resources for litigation of all cases are simply unavailable. Mediation offers the promise of settlement with assistance of a neutral party trained to help the parties resolve their disputes. The advantages of mediation are many. It is a low cost alternative to litigation, with potential for resolving the dispute more quickly.[261] Thus, it has the potential to reduce agency backlogs of complaints if it is utilized during or prior to the investigative process.[262] Mediation has the ability to focus on the underlying interests of the parties and to accommodate those interests in a resolution agreeable to the parties.[263] Compliance with a negotiated resolution of the dispute is more likely because the solution was designed and agreed to by the parties.[264]

---

[259] Such policies and the decisions pursuant thereto should use available agency expertise. For example, currently when ADA cases in which cause has been found by the regional office are presented to the EEOC Commissioners for decisions regarding litigation, the Office of Legal Counsel, which contains significant ADA expertise, has no input into the recommendation. Conversation with EEOC Commissioner Rosalie Gaull Silberman. *See* Kaufman, *supra* note 254, at 31 (suggesting that courts using ADR establish rules to exempt cases from arbitration that involve complex or novel legal issues to insure that the judicial role of law development be preserved); Misteravich, *supra* note 255, at 40-45 (arguing that "hard cases," those with no legal solution from precedent, statute or other legal standard, be reserved for the courts, citing John Bell, POLICY ARGUMENTS IN JUDICIAL DECISIONS 25 (1983)).

[260] The Administrative Dispute Resolution Act provides the necessary authority for use of voluntary mediation. *See* 5 USC §572. In addition, companion bills have been introduced in Congress to encourage mediation of ADA Title I cases along with other discrimination cases. *See* 1993 H.R. 2016, 103d Cong. 1st Sess.; 1994 S. 2327, 103d Cong. 2d Sess. These bills contemplate mediation after reasonable cause has been found by the EEOC and after issuance of a right to sue letter to the charging party.

[261] Speedy resolution benefits both the parties and the agency. Mediation can reduce staff time required for each case. *See* Peer Study, *supra* note 224, at 105-06.

[262] Empirical evidence regarding the efficiency of mediation is mixed. *See* Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION, at 398-99 (1989). Kressel and Pruitt note that there is "little evidence that mediation has had any appreciable effect in reducing court backlogs." *Id.* at 398. The PEER Study found that the EEOC substantially decreased its backlog during the time period in which RCP was used, but noted that a number of other reforms contributed to the reduction. *See* PEER Study, *supra* note 224, at 100-04. The PEER Study concluded that mediation was not a major factor in reduction of the backlog, but did contribute to expedited processing of new charges. *Id.* at 102.

[263] *See* Stephen B. Goldberg, *Meditations of A Mediator*, 2 NEG. J. 345, 348 (1986); Craig McEwen, *Note on Mediation Research*, in Stephen B. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, DISPUTE RESOLUTION 155, 156 (2d ed. 1992).

[264] *See* Kressel & Pruitt, *supra* note 263, at 396-97; Janice F. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes*, in Kressel & Pruitt, *supra* note 263, at 34-35; Jay Folberg & Alison Taylor,

Mediation may be effective in preserving relationships between the parties which might be destroyed or at least severely damaged by the adversary process.[265] Mediation increases the control of the parties over the dispute resolution process, which many students of mediation believe increases self-esteem and competence.[266] In addition, most studies of mediation reflect high satisfaction levels on the part of participants.[267]

Despite these advantages, mediation of ADA disputes raises concerns as well. As noted above, resolution of disputes through mediation may result in diminished ability to identify and resolve systemic discrimination problems.[268] The primary function of agencies utilizing ADR may change from law enforcement to conflict resolution.[269] Additionally, less powerful parties may be disadvantaged by the less formal procedures.[270] If individuals with disabilities

---

Mediation 36 (1984); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S12 (1989); Craig McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981).

[265] *See* Folberg & Taylor, *supra* note 265, at 10-11; Feinberg, *supra* note 265, at S11. Mediation may also promote "cooperative problem-solving behavior that would make future disputes easier to resolve." Stephen B. Goldberg & Jeanne M. Brett, *Disputants Perspectives on the Differences Between Mediation and Arbitration*, 6 NEG. J. 249, 253 (1990). *See* Feinberg, *supra* note 265, at S11. These attributes will be important in certain types of ADA disputes where an ongoing relationship is involved. Examples would include employment cases where employment will continue after resolution of the dispute, public accommodation cases involving regular customers, e.g., a doctor/patient relationship, and public entity cases involving regular consumers of government services. An example of the latter would be a dispute between a transportation agency and a group of commuters with disabilities. Where disability rights advocates are involved in a dispute, use of mediation may improve the ability of the defendant and the disability community to resolve later disputes.

[266] *See* Folberg & Taylor, *supra* note 265, at 11. Many advocates of mediation see the primary benefit of the process as self-determination. *See id.* at 35; Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 266-73 (1989).

[267] *See* Kaufman, *supra* note 254, at 22-23; Kressel & Pruitt, *supra* note 263, at 395-96; Goldberg & Brett, *supra* note 266, at 250-52; McEwen & Maiman, *supra* note 265, at 254-60. Among factors influencing participant satisfaction are the level of control and privacy, Kressel & Pruitt, *supra* note 263, at 396; the belief that the mediator understood the dispute, the lack of formality, and the belief that important facts were heard, Goldberg & Brett, *supra*, at 251-52. Data suggest that satisfaction level is not dependent on outcome. *See id.*; Kaufman, *supra* note 254, at 23.

[268] *See supra* notes 234-36 and accompanying text.

[269] *See* PEER Study, *supra* note 224, at 9-10.

[270] *See* Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1398-99 (1985); Richard Abel, *Informalism: A Tactical Equivalent to Law*, 19 Clearinghouse Rev. 375, 383 (1985); William Simon, *Legal Informality and Redistributive Politics*, 19 Clearinghouse Rev. 385, 386, 388 (1985). Additionally, there is some evidence that mediation is more likely to result in agreement when the parties are of relatively equal power. See Kressel & Pruitt, supra note 263, at 404-05. A study of 600 cases in small claims court in New Mexico evaluated outcomes of cases assigned randomly to mediation and adjudication. The results revealed that women fared better in mediation than in adjudication, although their subjective evaluation of mediation was more negative than their evaluation of adjudication. Minorities, who were predominantly Hispanic, fared worse in mediation than in adjudication. The minority disputants fared worse in mediation

are disadvantaged in mediation, relative to litigation, then mediation is inconsistent with the goals of the statute.[271] Related to the power issue is the need to ensure that the individual's disability does not preclude effective participation in mediation, which requires more direct involvement by the parties than litigation, where the parties' representatives play a more active role.[272] Any mediation procedure adopted needs to take into account these concerns.

2. Analysis of Other Mediation Systems in Civil Rights Cases

In determining whether to utilize mediation under the statute, it is useful to consider other efforts to use mediation in the discrimination context. The discussion above relating to early complaint resolution procedures evaluated the advantages and disadvantages of the EEOC's Rapid Charge Processing system and the Office of Civil Rights' Early Complaint Resolution procedure, both of which involved mediation. In addition, local civil rights agencies in Chicago and Washington, D. C. have utilized mediation in discrimination cases. While there has been no systematic evaluation such as the PEER study, some data is available regarding these mediation programs.

The District of Columbia Department of Human Rights and Minority Business Development successfully mediates about 100 cases per year.[273] The agency handles cases alleging discrimination in employment, housing, public accommodation and education.[274] Mediation is offered to complainants at the

---

than whites also, although the differences disappeared when both mediators were mediators of color. Minority disputants were more enthusiastic about mediation than white disputants, however, despite the objective monetary disadvantage. Presentation of Michele S. G. Hermann, "What Happens When Mediation is Institutionalized to the Parties, Practitioners and Host Institutions?," Program of AALS Section on Dispute Resolution, January 1994. One explanation of these differences may be that the parties are more interested in process than outcome. Comments of Robert Baruch Bush, *id.*

This disadvantage, if true, may contradict one of the perceived advantages of mediation, that it empowers the parties. *See* McEwen, *supra* note 264, at 156 ("No compelling evidence exists to resolve the debate between those who argue that mediation empowers disputants and those who argue that it harms disadvantaged parties.") It is possible that both are true. A party may be empowered (or feel empowered) by the process yet objectively receive less relief than he or she would have received in litigation. As McEwen notes, definitions of empowerment may vary as well. *Id.* In one view empowerment may come only from legal advocacy, while in another it may come from more direct involvement in the dispute and its resolution. *Id.*

[271] In determining disadvantage, however, the empowerment potential of mediation should be considered and valued. In addition, in determining the benefits of litigation and settlement, the psychic cost of lengthy litigation should not be undervalued.

[272] *See* Targeting Disability Needs, *supra* note 115, at 35-37.

[273] Data regarding the D.C. Department of Human Rights and Minority Business Affairs was received from La Verne Fletcher, Acting Supervisor, Mediation. Successful mediation consists of resolving the dispute with an agreement between the parties.

[274] The number of cases filed per year varies from 400 to 700. Disability discrimination is covered by the law and the agency has mediated some disability discrimination cases, but separate data on those cases is not available.

time the charge is filed. Almost all complainants agree to mediate, which may be a result of the fact that mediation occurs within a few weeks of filing while investigations take twelve to fifteen months to complete. The respondent is then served with the complaint and given the option to mediate. If the respondent agrees to mediation, the mediation is scheduled. When the program began in 1990, only about one third of respondents agreed to mediation, but that number has been increasing and the agency is beginning to see repeat customers among respondents and respondents' counsel. The settlement rate in mediation has been 40% to 50%. There is one staff mediator, who not only is involved in mediations, but recruits and trains volunteer mediators, who come primarily from other local mediation programs. The staff mediator is also responsible for educating respondents and potential respondents about the program.

If a case is not resolved in mediation, it is transferred to the investigative unit. The mediation is confidential and nothing which occurs in mediation becomes part of the investigative file. The agency has a form for the settlement agreement which is used in all cases. In addition, the agency reviews all agreements to be sure that they are balanced and enforceable before closing the case. To date, the agency has not had any complaints about failure to honor settlement agreements. If such a complaint were raised, however, the agency would attempt to resolve the dispute, and if unable to do so, would either reopen the case or use the office of the corporation counsel to enforce the agreement.

The Chicago Commission on Human Relations uses mandatory conciliation[275] for all cases in which it has found substantial evidence of a violation.[276] The mediators are attorneys with a background in discrimination law and training in mediation. The mediators are paid by the Commission,[277] and no fee is charged to the parties for mediation. Approximately 50% of the cases mediated settled at this stage,[278] and 77% of the disability cases conciliated settled.[279] If no settlement is reached at the conciliation conference, the case is scheduled for an administrative hearing.

---

[275] If the complainant fails to attend the conciliation conference without good cause, the complaint may be dismissed and\or the complainant may be ordered to pay the conciliator's fees. Amendments to Rules and Regulations Governing the Chicago Human Rights Ordinance, Chicago Fair Housing Ordinance, and the Chicago Commission on Human Relations Enabling Ordinance, Section 230.100(b) (Amended January 27, 1993) (hereinafter "Amended Rules"). If the Respondent fails to attend, a default judgment may be entered against the Respondent. *Id.* In addition, the failure to attend will be considered in determining the amount of attorneys fees awarded if the complainant prevails at hearing. *Id.* Respondent also may be ordered to pay the conciliator's fees. *Id.*

[276] Information regarding the procedure was obtained from Miriam I. Pickus, Deputy Commissioner of the Chicago Commission on Human Relations and from the Rules and Regulations Governing the Chicago Human Rights Ordinance, the Chicago Fair Housing Ordinance, and the Chicago Commission on Human Relations Enabling Ordinance (hereinafter "Chicago Rules"). The Commission has jurisdiction over discrimination in employment, public accommodation, and housing in the City of Chicago, including discrimination based on disability.

[277] Compensation for the attorneys is below the market rate, but the Commission has had no difficulty in obtaining attorney/mediators.

[278] These statistics are for the twelve month period preceding September 1994.

In disability cases, the Commission also uses a procedure known as a disability evidentiary conference.[280] The conference, which serves both factfinding and settlement purposes, is employed when the Commission determines based on a preliminary investigation, that the respondent's facilities are not fully accessible to the complainant.[281] Prior to the conference, the respondent is required to submit an affidavit with evidence of undue hardship.[282] The complainant files a responsive affidavit.[283] At the evidentiary conference the conciliator attempts to resolve the dispute, but if no settlement is reached the conciliator submits to the Commission's compliance staff a recommendation on whether the staff should find substantial evidence of a violation.[284] If the staff finds substantial evidence, it may waive the normal conciliation conference and proceed directly to an administrative hearing.[285]

In accessibility cases, the Commission can use the city's Office for People with Disabilities to perform a site survey and determine what changes would make the facility accessible. These technical experts even prepare blueprints for the design change, which saves money for the business and facilitates settlement of accessibility disputes.

Under the Chicago Rules, settlements are written, signed by the parties and the conciliator, and presented to the agency's Compliance Staff for approval.[286] Approval, which results in an order approving the settlement and dismissing the complaint, is granted if the settlement is knowing and voluntary, unambiguous, and consistent with the ordinance. As a condition of approval, the Commission may require compliance reports. The Commission retains jurisdiction to enforce the settlement and the parties must acknowledge in the agreement the Commission's jurisdiction to seek judicial enforcement of the agreement. To obtain enforcement of the agreement, a party must notify the Commission in writing. The Commission investigates, and if it finds substantial evidence of a violation of the agreement, it must notify the parties in writing and have the city's Corporation Counsel seek judicial enforcement of the order approving the settlement.

---

[279] The actual numbers of disability cases are small, however. Letter from Miriam Pickus, September 13, 1994. From 1991 to 1993, the Commission found substantial evidence in 36 disability cases involving employment and public accommodation. *Id.* Twenty-eight were settled, with four cases still pending as of September 1994. *Id.* For all disability cases for the time period from 1991 through 1993, the Commission closed 72 employment cases, 41 by settlement agreement, a settlement rate of 57%. *Id.* Fifty-three public accommodation cases were closed, 35 by settlement agreement, a rate of 66%. *Id.* These settlements include those reached at a conciliation conference, cited above, as well as settlements during investigation either through a Disability Evidentiary Conference, see *infra* notes 281-86 and accompanying text, or without such a conference. *Id.*

[280] *See* Chicago Rules, *supra* note 277, at Subpart 525. Like the conciliation conference, the disability evidentiary conference is mandatory and failure to appear subjects the parties to the same penalties. *See id.* at §525.125.

[281] *See id.*

[282] *See id.* Like the ADA, proof of undue hardship eliminates the accommodation obligation under the Chicago Ordinance. *See id.* at §520.100.

[283] *See id.*

[284] *See id.* at §525.115. For settlement statistics which include settlements reached at Disability Evidentiary Conferences, see *supra* note 280.

[285] *See id.* at §525.120.

[286] The description of settlement procedures, including enforcement procedures is taken from Chicago Rules, *supra* note 277, at §§230.130, 230.140.

These two procedures, Chicago's and the District of Columbia's, have some common elements and some significant differences, but both have been relatively successful in settling cases. The voluntary procedure, offered early in the investigation process has employed significant educational efforts to increase participation. Complainants are encouraged to participate by the promise of rapid processing through mediation. Respondents' participation rate has increased through educational efforts and successful participation in the procedure. The mandatory procedure has a high rate of settlement for mandatory mediation, but that may be attributable to the fact that it is employed after a finding of substantial evidence or for the Disability Evidentiary Conference, after a finding of a technical violation.

Both procedures are cost free to the parties, except for their representation, should they choose to use it. Both procedures provide for agency approval and enforcement of settlement agreements to ensure consistency with the statutory mandate. Because no systematic study of the mediations has been done, there is no evidence regarding whether complainants are disadvantaged by the process in any way.

These procedures contain some elements that contrast with procedures that have achieved less success in participation. A mediation pilot project at the Illinois Human Rights Commission, which charges the participants a filing fee to participate in mediation, has resulted in very limited participation.[287] The Department of Justice pilot project, where the charges are dismissed before mediation, has also resulted in limited participation.[288] Under the latter procedure, respondents have limited incentive to engage in mediation. Additionally, the Department of Justice project has been unable to engage in educational efforts about mediation prior to agreement to participate because the grantor, who is set up to engage in such education, cannot be given the names and addresses of the parties until they agree to participate because of limitations under the Privacy Act.[289]

---

[287] Conversation with Lamont Stallworth, Chicago Center for Employment Dispute Resolution.

[288] Information from Department of Justice, Public Access Section.

[289] *Id. See* 5 USC §552a.

The results of the EEOC pilot mediation project also yield useful information. Respondents were less likely to agree to participate than complainants. The cases included large numbers of discharge cases in which agreements to mediate were particularly difficult to obtain. The settlement rate of the EEOC project was similar to those of the Chicago and District of Columbia agencies.

Finally, the Better Business Bureaus/ADA Coalition of Connecticut ("BBB/ADACC") Center for Dispute Settlement has mediated disability discrimination cases referred by the Connecticut Commission on Human Rights and Opportunities ("CCHRO"), the state agency enforcing Connecticut anti-discrimination laws.[290] The program was initiated in April 1994 as a pilot program involving one CCHRO office and cases alleging only disability discrimination. The CCHRO has recently expanded the program to include all CCHRO offices, all types of discrimination, and a number of different ADR service providers. In addition, the BBB/ADACC is offering mediation in disability discrimination cases that have not yet been filed with any agency.

The pilot program is similar to other programs described. The CCHRO first screened the cases and referred those deemed appropriate to mediation.[291] If the complainant agreed to mediate, the charge was sent to the respondent, along with information regarding mediation. If the respondent agreed, then the CCHRO sent a joint request for mediation to the BBB/ADACC Center. The Center then contacted the parties and provided additional information regarding the mediation process. The Center used volunteer mediators who were trained by the Center on disability law. The parties were charged a $60.00 fee for mediation, with financial aid available to parties unable to pay the full fee. If an agreement was reached in mediation, it was recorded on an agreement form. The agreement was reviewed by the Center to ensure that it was administratively correct and then forwarded to the CCHRO for review for enforceability and systemic discrimination problems. Upon approval by the CCHRO, the case was closed.

If no agreement was reached, the case was returned to the CCHRO for investigation and did not lose its investigation priority by virtue of referral to mediation. The mediation process was confidential and nothing that occurred in mediation is admissible in any subsequent litigation.

---

[290] Information regarding this program was obtained from Suzanne Ghais, Connecticut Better Business Bureau, presentation on March 31, 1995, at Collaborative Approaches: A Conference on Disability Aging and Dispute Resolution, Washington, D. C.; telephone conversation with Paulette Hotton, BBB/ADACC; and telephone conversation with Rick Gomez, Human Rights & Opportunities Representative, Connecticut Commission on Human Rights and Opportunities.

[291] The agency withheld from mediation cases that appeared to raise issues with precedential impact or affect large groups of individuals. This determination and a post-settlement review help preserve the law development function and the enforcement role for systemic litigation.

Because of the scope of the state law, the cases referred for mediation were employment discrimination cases. In the first year of the program, there were five mediations, three of which resulted in settlement. As noted, the satisfaction of the agencies involved and the parties has led to expansion of the program. Educational efforts have been expanded as well in order to increase participation in the program. The expanded program is similar to the pilot program in process, but includes additional ADR service providers trained and certified by the CCHRO. The parties may choose a service provider from the CCHRO list or any other provider. The ADR program is combined with an early assessment program which classifies cases for investigative purposes. Unlike the pilot program, the expanded program gives the agency the option to mandate the use of ADR in cases deemed appropriate. Future assessment of the effectiveness of this program may provide useful information for designers of the recommended ADA mediation program.

3. An ADA Mediation Proposal

The review of these existing programs and mediation research supports the use of mediation by the ADA enforcement agencies. Mediation of ADA cases offers the potential to reduce the backlog of cases, reach satisfactory results for the parties, and effectuate the purposes of the statute. Successful mediation at the administrative level also may reduce the number of cases judicially litigated. Furthermore in mediation the parties take responsibility for resolving their own dispute, reducing reliance on government enforcement. A mediation program should be designed carefully, however, to minimize the disadvantages of mediation discussed above and to ensure active participation. Ideally, the mediation program should strive for a high settlement rate, a high compliance rate, and party satisfaction. The program cannot lose sight of the statutory goals as well and it is particularly important to maintain the focus on protection of the rights of individuals with disabilities.

Initially, the concern that mediation will interfere with the law development function must be addressed. While judicial development of the law is particularly important with a recently enacted statute, the mediation program proposed will not interfere with that function. The proposed program is voluntary, so many cases will not be mediated.[292] Of those cases mediated, many will not settle.[293] Accordingly, there will be many cases available for judicial litigation. In addition, the program proposes that the cases be screened on intake and at that point, the agencies can identify cases raising issues that the agency has targeted for law development, investigating those cases for litigation purposes while referring other cases to mediation.[294] Thus the law development function will be preserved, at the same time that quicker resolution is available for many parties through mediation. The program design set forth below is calculated to minimize other disadvantages of mediation and they will be discussed further in the course of the program analysis.

---

[292] In the EEOC pilot project, 87% of charging parties and only 43% of respondents offered mediation agreed to mediate, which would leave well over half of the cases in which mediation is offered for litigation. *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 3.

[293] Only 52% of the mediated cases in the EEOC Pilot Program settled, again leaving a large percentage of cases for litigation. *See id.*

This report makes a series of broad recommendations regarding program design.[295] An extremely important element of designing the program, however, is input from those who will be potential users of the system.[296] In the course of this study, many representatives of various groups have been consulted.[297] Further, more extensive consultation will provide significant benefits. In order to be effective the program must meet the needs of the parties to ADA disputes.[298] In addition, disputants are more likely to use the procedures if they are involved in their design.[299] Involvement of leaders of organizations representative of those likely to utilize the procedures in the design will enable them to educate and motivate their constituents to participate in mediation, enhancing the likelihood of success of the project.[300]

The Federal Advisory Committee Act ("FACA")[301] provides a mechanism for incorporating the input of representatives of potential disputes in the design of the mediation program. FACA permits establishment of an advisory committee where the head of the agency involved determines that it is in the public interest in connection with the performance of the agency's duties.[302] FACA governs the procedure for establishment and operation of the committees.[303] Use of an advisory committee pursuant to FACA will insure effective input into the design process through the exchange of ideas among representatives of various groups participating on the committee. The communication and commitment inherent in the advisory committee process provide advantages over mere solicitation of written comments, which should enhance both the development of the mediation project and subsequent participation in the process.

---

[294] *See* Letter from Richard T. Seymour, Lawyers Committee for Civil Rights Under Law, to Frances M. Hart, Equal Employment Opportunity Commission, regarding Comments on Alternative Dispute Resolution, September 20, 1993 at 5-6 (hereinafter "Lawyers Committee Comments").

[295] For useful information regarding program design, see Administrative Conference of the United States, Systems Design Work Group, *The Dispute Systems Design Pre-Design Organizational Checklist* (June 30, 1993) (hereinafter "*Pre-Design Checklist*"); Administrative Conference of the United States, Dispute Systems Design Working Group, *Operational Aspects of Designing Dispute Resolution Systems* (February 1994) (hereinafter "*Designing Systems*").

[296] Examples of such groups are the various groups that represent individuals with disabilities, the Better Business Bureau, the Equal Employment Advisory Council, the Chamber of Commerce, the National Association of Manufacturers, and labor organizations. In employment cases where the employees are represented by a union, unique issues arise that must be taken into account in program design and settlement. *See infra* note 324. Accordingly, the involvement of labor organizations is important to the process.

[297] While the report owes much to the ideas and information from the various people consulted, the recommendations herein are solely those of the author.

[298] *See* William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, GETTING DISPUTES RESOLVED 65 (1988).

[299] *See id.*; *Designing Systems*, *supra* note 296, Section I, at 4.

[300] Ury, Brett & Goldberg, *supra* note 299, at 76.

[301] 5 USC app. II (1988).

[302] 5 USC app. II, §9(a)(2).

The successes and failures of prior projects as well as mediation research should guide the design of the system. As in the consideration of an ALJ system, an initial question is whether a common mediation system should be established. For the reasons discussed in connection with an ALJ system, use of a common mediation system is a sensible approach. Although the agencies lose some control, the development and use of expertise on disabilities in general and the ADA in particular is a significant benefit of a common system. Furthermore, a common system will coordinate the enforcement efforts of the diverse agencies involved in ADA enforcement. The enforcement agencies should establish a joint committee composed of representatives from each agency to design a mediation program that will be effective in cases under all titles of the ADA.[304]

a. Voluntary or Mandatory Mediation

A significant question to be addressed is whether mediation should be voluntary or mandatory. The ADA authorizes voluntary mediation.[305] Neither the ADA nor the Administrative Dispute Resolution Act clearly authorizes mandatory mediation, however. The legislative history of the ADA indicates that the encouragement of alternative dispute resolution was not intended "to preclude rights and remedies that would otherwise be available to persons with disabilities."[306] The conference report on the ADA states that "it is the intent of the conferees that the use of...alternative dispute resolution is completely voluntary."[307] This legislative history strongly supports the conclusion that ADR should be voluntary. Mediation does not preclude any rights and remedies, however, for if no agreement is reached in mediation, all other rights and remedies are still available. In addition, both Congressional statements reference arbitration, directly or indirectly, suggesting Congressional concern about compulsory arbitration rather than mediation. Accordingly, it might be argued that mandatory mediation is permissible.

---

[303] *See* 5 USC app. II, §§7, 8, 9, 10, 11, 12, 13.

[304] The primary enforcement agencies which should be involved in the design of the program include the EEOC, the Department of Justice, the Department of Transportation, and the Federal Communications Commission. The Title II investigative agencies can also provide input into the design of the process, in addition to referring cases to the program and participating in the educational effort. These agencies include the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior and Labor. *See* 28 CFR §35.190.

The EEOC's recent endorsement of ADR and prospective adoption of mediation is consistent with this proposal. Indeed, the program proposed by the EEOC appears to incorporate many of the elements suggested *infra*. *See supra* notes 123-37 and accompanying text.

[305] *See* 42 USC §12212. This section, Section 513, encourages ADR where appropriate and authorized by law. The Administrative Dispute Resolution Act also authorizes agencies to use voluntary dispute resolution proceedings. *See* 5 USC §572.

[306] *See* Legislative History of Public Law 101-336, The Americans With Disabilities Act, Vol. 1 at 516-17 (Committee Print 1990). Congress notes agreement with the Supreme Court's decision in

Nevertheless, the lack of any exhaustion requirement under Titles II and III suggests that plaintiffs could not be compelled to mediate cases under those titles. Since there is no requirement to file an administrative complaint or to wait for administrative action, the plaintiff could not be compelled to delay judicial action pending mediation. Title II complaints, where investigation is required, could not be dismissed for failure to mediate. In addition, dismissal of a Title III complaint for failure to mediate may affect the remedies available since only the Department of Justice can sue for damages under Title III. With respect to cases under Titles I and IV, which involve mandated agency procedures, mandated mediation may be an option. The EEOC's Rapid Charge Processing system implemented under Title VII required participation in a mediation conference.[308] Since Title I adopts Title VII procedures, and nothing in the ADA expressly precludes mandatory mediation, it may remain an option for the EEOC.

Even where mandatory mediation is permissible, a determination must be made as to whether it is appropriate in ADA cases. The case for mandatory mediation is based on a belief in the value of the process. Parties that would not voluntarily mediate may settle in mandatory mediation and be satisfied with the process.[309] Mandatory mediation may increase the efficiency impact of mediation.[310] Nevertheless several concerns arise in connection with mandated mediation. If settlement is not reached or would have been reached without mediation, mediation may simply increase the parties' costs.[311] In addition, if

---

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which held that an arbitration award did not preclude judicial litigation of a Title VII claim.

[307] H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), quoted in Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, 48 ARB. J. 8, 16 (1993).

[308] *See* PEER Study, *supra* note 224, at 150.

[309] *See* Society of Professionals in Dispute Resolution, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* 12-13 (1991) (hereinafter "SPIDR Report"). Reluctance to mediate may result from lack of knowledge about the process or fear of appearing weak. *Id.* If the parties truly have no interest in settlement, however, mandatory mediation wastes the time and resources of the parties, the mediator, and the agency. Some of the difficulties that existing mediation projects have had in obtaining participation suggest consideration of mandatory mediation.

[310] *See id.* at 2, 12-13. A larger scale program may achieve more benefits more efficiently.

[311] *See id.* at 1, 13. The emotional costs to the parties may also be increased. *See id.* at 1.

individuals with disabilities are disadvantaged in mediation,[312] then compulsion to mediate should be avoided.[313] A large scale mediation program may become so routinized that the benefits of mediation are lost.[314] Given the risks, and the probable need for legislative change to compel mediation of claims under Titles II and III,[315] the first effort should be voluntary mediation.[316] Ongoing assessment of the voluntary mediation efforts should reveal whether mandatory mediation might be effective.[317]

b. The Timing of Mediation

Another important issue is the timing of the mediation. If mediation takes place early in the investigative process, before positions harden, settlement may be more likely.[318] On the other hand, at that point, the parties may be insufficiently aware of the strengths and weaknesses of both their own position and that of the other party to be motivated to settle.[319] The systems discussed above used both models with some success. So long as mediation is not used as a delaying tactic or to impose costs on a party with fewer resources, there seems to be little reason to limit access to mediation. A combination of early intervention techniques and use of mediation could reduce the backlog and speed case processing, providing benefits to the parties as well as the government.[320]

---

[312] *See supra* notes 271-72 and accompanying text.

[313] *See* PEER Study, *supra* note 224, at 151; SPIDR Report, *supra* note 310, at 1-2.

[314] *See id.* at 13-14.

[315] Legislative change would also be necessary to authorize agencies to impose effective penalties for respondents' failure to participate, such as payment for the conciliator or payment of plaintiff's attorneys fees. *See supra* note 276 and accompanying text. The ADA does not currently authorize the enforcement agencies to impose penalties for noncompliance, but Congress could authorize agency imposition of monetary penalties with appropriate safeguards. *See* Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977); Crowell v. Benson, 285 U.S. 22 (1932).

[316] Another reason to implement voluntary mediation initially is the additional cost of a mandatory mediation project.

[317] Should mandatory mediation be considered, the SPIDR Report's criteria for mandatory mediation should be followed. *See* SPIDR Report, *supra* note 310.

[318] *See* Christopher W. Moore, THE MEDIATION PROCESS 57 (1986)

[319] *See id.* This may create particular problems for complainants who may have insufficient access to information to evaluate the strength of their case. For this reason, the Lawyers Committee suggests that some investigation take place before referral to ADR. *See* Lawyers Committee Comments, *supra* note 295, at 2. The proposal here contemplates only preliminary intake information, carefully collected to increase the likelihood of correct identification of issues. Such limited investigation may prove insufficient to facilitate effective mediation. A requirement of more extensive investigation would utilize more agency resources, however, raising the cost of mediation. This issue should be addressed in evaluation of the pilot project and the design of any subsequent mediation program should be structured accordingly.

[320] This approach has just been adopted by the EEOC. *See supra* notes 123-37 and accompanying text. The Connecticut Commission on Human Rights and Opportunities also has implemented such a system. *See supra* notes 291-92 and accompanying text. The mediation system and early intervention program each could be implemented alone as well.

Such a system could operate as follows.[321] When complaints are filed, investigators or intake officers should be trained to ask questions that would enable the agency to classify the case in several ways.[322] This interview, whether done in person or by telephone, should reveal the nature of the dispute; whether it turns primarily on factual issues, legal issues or both; whether it involves novel legal questions; whether technical expertise such as that of engineers, architects, medical or vocational experts might be useful; whether systemic problems may exist; and whether the case appears frivolous or unsupported by any evidence.[323] When the interview reveals issues that the agency has decided have priority for purposes of development of the law, the case can be diverted from the mediation track and litigated by the agency, thereby preserving the law development function of the agency and the courts. Great care should be taken in developing the questions to be asked and in training the investigators to ensure that cases are correctly classified initially.[324] The importance of this task cannot be overestimated because it will determine the success of the system. Nevertheless, initial classification should not be determinative if later investigation reveals additional information.

---

[321] Each agency handling ADA cases would have to adapt this proposed process to its particular needs and staffing patterns. I attempt here, however, to sketch out broad outlines of how such a process might work.

[322] Training particular employees to perform this function, rather than having it done by the investigator or intake officer assigned to the case has certain benefits. More intensive training of fewer people will make the system function more efficiently than limited training of all staff. As noted, *infra*, relatively accurate assessment of cases at this stage is crucial to the success of this endeavor. The relative accuracy of the assessments should be a part of the employees' evaluation to insure accountability. If the employees who made the assessment also investigated the cases, they might have an incentive to ignore information that cast doubt on the accuracy of their initial assessment. Also, investigators might be reluctant to refer for mediation cases that they thought would settle, desiring to retain credit for the settlement. *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 7. Of course, if the ultimate goal is settlement of those cases that can be settled fairly to all parties, the matter of credit for the settlement is irrelevant. If the mediation process is a better vehicle for achieving a fair settlement satisfactory to the parties, however, then referral to mediation should be encouraged.

[323] At this stage, the agency should attempt to determine whether there are class or systemic issues involved. If such issues are apparent, the agency should consider whether referral to mediation is appropriate. While systemic issues are not per se inappropriate for mediation, it is essential that the plaintiff class be adequately represented in mediation and that the mediation deal with the systemic issues rather than allowing an individual to settle for individual relief, leaving the class issues unremedied. Thus, mediation might be appropriate where there is counsel, a disability rights organization or a labor organization to represent the group and deal with the systemic issues. Where no such representative is available, the agency should consider continuing the investigation and leaving any settlement negotiations until the point in time where the agency has taken the case as an advocate. For discussion of class issues and agency mediation, see PEER Study, *supra* note 224, at 126-34.

Another significant issue that should be considered at this point is whether the complainant can effectively participate in mediation. This is particularly important in the case of individuals with cognitive impairments, some of whom may not have the capacity to participate in mediation. *See Targeting Disability Needs*, *supra* note 115, at 35-36. Agencies should be extremely cautious in determining that an individual does not have the capacity to participate in mediation to avoid falling into the very stereotypes that the ADA was designed to eliminate. *See id.* The agency should explore ways to mediate effectively with the individual before concluding that mediation will not be effective. *See id.*

In employment cases, the presence of a union representative should be ascertained at this point as well. Union representation with the accompanying collective bargaining agreement raises unique issues for settlement. For consideration of these issues, see Nancy Segal, *The Use of Alternative Dispute Resolution to Resolve ADA Issues in the Unionized Workplace*, presented to the 21st Annual Conference of the Society of Professionals in Dispute Resolution and Ann C. Hodges, *The ADA in the Unionized Workplace*, 48 U. MIAMI L. REV. 567 (1994).

Like the Washington Field Office system at the EEOC, the classification should then determine the additional resources expended on the case by the agency. At this stage mediation should be offered to the parties. The time period for mediation should be limited[325] and, absent settlement, the case should be returned to its place in the investigation queue.[326] Initially, mediation should be offered in all cases, except those targeted for litigation for law development purposes. Should analysis of initial results of mediation suggest that some cases are more amenable to mediated settlements,[327] the agencies should consider special efforts to convince parties in those cases to try mediation. For example, cases involving reasonable accommodation in employment and access to facilities and services under Titles II and III seem particularly appropriate for mediation.[328] In most such cases there are a range of options to resolve the dispute, which is precisely the kind of case where mediation works well. The mediator can explore the various options with the parties, searching for a solution satisfactory to all.

---

[324] Investigators must take particular care with unsophisticated or inarticulate complainants who may themselves be unaware of the evidence relevant to establishing a violation of the law. Each agency should develop appropriate questions, investigation techniques and guidelines for classification for the sections of the ADA under its jurisdiction.

[325] Time limits will discourage the parties from using mediation for delay purposes, and further the goal of speedy case processing. The time period for mediation must be adequate to allow for scheduling the mediation and thoroughly exploring settlement possibilities with the mediator. The EEOC pilot project used a sixty day time period, which seems appropriate if resources permit.

[326] In order to insure that agency employees do not discourage mediation, they should not be penalized for any additional time that the investigation takes as a result of the "time out" for mediation. The mediated case should be given the same priority that it had before the parties opted to try mediation, however, to avoid discouraging the parties. In addition, in order to encourage participation in mediation, the classification for further investigation purposes should not be revealed to the parties. The pilot project should not deny mediation based on the agency's view of the merits upon the intake interview. This issue should be addressed in evaluation of the pilot project, however. The results of the pilot project should assist in a determination of whether charges that appear meritless and/or charges that appear to be clear violations should be withheld from mediation. *See* Lawyers Committee Comments, *supra* note 295, at 2.

[327] This report suggests that a pilot project be established. The pilot project should mediate a range of cases, enabling analysis of effectiveness in various types of disputes.

[328] These cases involve fact-based and case specific application of standards and therefore, are particularly appropriate for alternative dispute resolution. *See* Administrative Conference of the United States, Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3, *reprinted* in Administrative Conference of the United States, *Agency Arbitration*, Studies in Administrative Law and Procedure 88-1, at 77; President's Committee on Employment of People with Disabilities, ADR Workgroup, *Alternative Dispute Resolution and the ADA*, submitted in response to EEOC's Request for Comments, at 3-4.

Cases involving issues such as discharge from employment or whether an individual is disabled present more difficulty. These cases are susceptible to mediated solutions, however, and should not be excluded.[329] An employer who adamantly refuses to reemploy a discharged individual might be willing to pay back pay and provide a positive reference to avoid litigation.[330] Similarly, a dispute over whether an individual is disabled could be resolved by settling the underlying issue, providing accommodation in employment for example, without determining whether a statutory disability exists. Mediation also offers potential to settle large cases such as those involving transportation systems.[331] Use of negotiated rulemaking and mediation in environmental disputes has demonstrated that even large, multi-party disputes can be resolved through alternative processes.[332]

In order to ensure that a voluntary mediation system is utilized, the parties must be motivated to participate. First, the charges must be retained by the agencies pending mediation.[333] Second, written material describing the process, along with its advantages and disadvantages should be prepared for distribution to the parties.[334] Education is essential to convince the parties to disputes to use mediation and ensure satisfaction with the process by creating realistic expectations about the process and potential results.[335] This education must be undertaken by the agencies involved and their personnel, who must have a clear understanding of the process and a commitment to its use.[336]

---

[329] *See* EEOC's Report on ADR Pilot Program, *supra* note 100, at 6.

[330] *See id.* at 4.

[331] Disputes regarding the ADA's transportation provisions may be less susceptible to mediation for reasons other than size of the dispute and number of interested parties. Many of the statutory transportation requirements are quite specific, leaving less room for the flexibility of mediated solutions. *See, e.g.,* 42 USC §12162 (discrimination to purchase new rail passenger cars unless they are accessible to individuals with disabilities). These disputes should not be precluded from mediation, however. Even where the statutory requirements have not been complied with, a mediated solution with a timetable for compliance may be preferable to litigation. The Federal Transit Administration has taken a similar approach in negotiating compliance agreements for ADA requirements relating to complementary paratransit and key station accessibility. *See* Federal Transit Administration, Office of Civil Rights, *Informal Compliance Process* (1993). The legality of agency approval of a mediation agreement that conflicts with specific statutory requirements is questionable, however.

For the same reasons, Title IV cases may be less susceptible to mediation. *See, e.g.,* 47 USC §§225(c), (d); 47 CFR §§64.603, 64.604.

[332] *See* Negotiated Rulemaking Act, 5 USC §§561-70; Administrative Conference of the United States, NEGOTIATED RULEMAKING SOURCEBOOK (1990); Goldberg, Sander & Rogers, *supra* note 264, at 345-56; Linda R. Singer, SETTLING DISPUTES 140-50 (1990).

[333] Retention of the charges is necessary to provide the threat of agency litigation that provides an incentive for respondents to participate in the process. In addition, it facilitates review of the settlement agreement and enforcement if necessary.

[334] The Department of Justice has already initiated this process with its grant for mediator training, which includes production of a consumer guide to mediation services.

[335] *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 5; PEER Study, *supra* note 224, at 152-53; *Designing Systems*, *supra* note 296, Section III at 1. La Verne Fletcher of the D.C. Department of Human Rights indicates that the mediation process begins when the complaint is filed. The mediator must sell mediation to the parties. Other alternative dispute resolution professionals consulted in the course

In addition to educating the parties to particular disputes, the agencies can make potential users of the process aware of its benefits by making presentations to groups such as disability organizations, employer organizations, government agencies, and business groups.[337] Persons who have successfully used the procedure may become proponents to others.[338] Successful mediations should be publicized to the extent possible to encourage others to utilize the process.[339] The process of dispute settlement is also likely to be more effective if the users are trained.[340] Training of potential disputants through the use of technical assistance grants, such as the joint training undertaken by the EEOC and the Department of Justice, will serve the dual purpose of training potential users and creating advocates of the system.[341]

Early mediation serves the goal of speedier resolution, which should help reduce the backlog. Because of the investigation backlogs in most agencies, mediation should not cause delays in the process if cases are simply referred for mediation and, if no settlement is reached, inserted back in their rightful place in

---

of this study support the importance of education in convincing parties to participate effectively in the process. *E.g.*, Lee Russell, Center for Dispute Resolution, San Diego, California. *See also* Brown & Marriott, *supra* note 254, at 121-23.

[336] *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 4, 5; *Designing Systems*, *supra* note 296, Section III, at 1, 4. The Department of Justice Pilot Project has had limited success in obtaining agreements to mediate which may be due, in part, to the failure to undertake an educational effort. *See supra* note 290 and accompanying text. The EEOC project, which included an educational effort, was more successful at obtaining agreements to mediate, although it too experienced some difficulty which required extending the project to reach the targeted number of mediations. *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 2-3. Use of agency personnel for education will avoid the Privacy Act problems that created difficulties in the DOJ Pilot Project.

If external mediators are used, they, too, could be a part of the educational process. *See* Moore, *supra* note 319, at 53-54

[337] The D. C. Department of Human Rights has utilized educational presentations to increase participation in mediation. The presentations might even include simulated mediations or other demonstrations of the procedure. *See* Ury, Brett & Goldberg, *supra* note 299, at 76. The Federal Trade Commission has used radio public service announcements to publicize the benefits of dispute resolution to consumers. Information from ACUS.

[338] *See* Ury, Brett & Goldberg, *supra* note 299, at 76. For example, businesses successfully involved in mediation might be willing to speak about their experience to business organizations. A potential source of support is the Better Business Bureau, which has been a leader in establishing ADR programs and has been working in ADA education as well.

[339] *See id.* at 77. Because of privacy protections and confidentiality, permission of the parties to publicize particular disputes would be necessary, but statistical data could also be used for publicity purposes.

[340] *See id.* at 78-79.

[341] *See supra* notes 115-18 and accompanying text. These and future trainees might also serve as advocates for individual disputants, helping balance the power in the process. *See infra* notes 397-99 and accompanying text.

the investigation queue. Those who decline mediation at an early stage should not be precluded from choosing mediation later, should they decide to do so. Agency investigators and attorneys should be alert to the possibility of later mediation, even after a cause finding. Cases not ripe for early settlement might be excellent candidates for later mediation as the facts develop and the parties become more aware of the evidence.

c. The Source of Mediators

The next crucial question is the source of the mediators. Since there is no charge to parties for the investigation process, any charge for mediation would discourage use of mediation.[342] Thus, the option should be cost free to the parties.[343] Cost to the agency, training, and availability for timely mediation are essential factors to be considered in determining the best source of mediators. There are several potential sources of mediators. First, agency employees could be trained in mediation. If agency employees are used, the mediation could be separate from the investigative process,[344] or a part of the process.[345] The second possible source of mediators is employees from other agencies, trained in mediation.[346] Third, the process could use mediators from the Federal Mediation and Conciliation Service, which currently mediates labor disputes and cases under the Age Discrimination Act.[347] The final alternative is outside mediators.[348] There are advantages and disadvantages to each system. Regardless of the source of mediators efforts should be made to include mediators with disabilities in the process.

Agency employees are familiar with the law and with the remedies that would result were the case to be litigated. Moreover, the agency would retain more control over the process if the mediators were agency employees. Most agency employees are not trained in mediation, however, and some may not be well-suited for such a role. Furthermore, employees at most agencies are stretched to the limit, and imposition of additional duties will require additional personnel. Some parties may prefer mediators unconnected with the agency, fearing disclosure of information that might facilitate settlement to an agency with statutory investigative responsibilities.[349] Thus, use of agency mediators may result in lower settlement rates or settlements without full information. This concern is greater where the mediation is part of the investigatory process than where mediation is separate and confidential.[350]

---

[342] Of course, the parties pay their own costs, such as attorneys' fees, in either process. Attorneys' fees for mediation should be recoverable, should the case be litigated, to the same extent as attorneys' fees for the other aspects of the administrative process.

[343] Mandatory mediation, if adopted, should also be equivalent to regular case processing in cost to the parties. *See* SPIDR Report, *supra* note 310, at 16.

[344] *See supra* notes 274-75 and accompanying text.

[345] *See supra* notes 276-87 and accompanying text.

[346] *See Inter-agency Pilot Project on Sharing Neutrals*, a paper describing the project of the Administrative Conference of the United States and a number of federal agencies. For further discussion of the project, see *infra* notes 354-59 and accompanying text.

[347] *See* 29 USC §§172, 173; 42 USC §6103; 34 CFR §110.32; 5 USC §7119; Linda R. Singer & Ronald A. Schechter, *Mediating Civil Rights: The Age Discrimination Act* (1986); Jerome T. Barrett & Lucretia Dewey Tanner, *The FMCS Role in Age Discrimination Complaints: New Uses of Mediation*, 32 LAB. L. J. 745 (1981); information from representatives of the Federal Mediation and Conciliation Service.

[348] *See supra* notes 103, 146 and accompanying text.

An additional drawback of using agency employees is that the employees with ADA expertise at many of the agencies are located in Washington, D. C., while the disputes that must be mediated are not limited to Washington.[351] Thus, the mediators or the parties would have to travel, adding to the costs, unless mediation was done by telephone, which is possible, but in many cases less effective.[352]

An alternative is to use employees from other agencies to mediate cases. This system would use a common corps of mediators for all titles as suggested above. The Administrative Conference and a number of federal agencies have begun a pilot project to promote sharing of mediators among federal agencies.[353] The mediators in the project are federal employees trained in mediation who will mediate cases for their own or other agencies on a collateral duty basis.[354] These mediators are available for external as well as internal disputes.[355] Agencies who use mediators must also contribute mediators or other resources to the project.[356] One advantage of using these mediators is the low cost. In addition, the mediators are trained and experienced.[357] There are two significant limitations to the use of these or similar mediators. The mediators are located in the Washington metropolitan area only,[358] and they are not specifically trained in the ADA. The latter concern is remediable. The former, however, is problematic and as in the case of agency employees, the mediator or the parties would have to travel for a face to face mediation.

---

[349] For example, see the comments of the Equal Employment Advisory Council, an association of major corporations, suggesting that respondents would have a disincentive to be candid with agency officials who might ultimately sue the respondent. *See* Comments of Equal Employment Advisory Council in Response to EEOC's Request for Comments on Alternative Dispute Resolution, Letter to Frances M. Hart from Jeffrey A. Norris, September 15, 1993, at 4.

[350] Even where mediation is confidential, however, the parties may not be convinced that the information disclosed in mediation will not be revealed to agency investigators and/or attorneys.

[351] The EEOC has investigators at various regional offices, but the employees handling ADA cases at other agencies are primarily, if not exclusively, in Washington.

[352] *See* PEER Study, *supra* note 224, at 157. A review of the various mediation techniques in Moore, *supra* note 319, and Folberg & Taylor, *supra* note 265, reveals that many depend on face to face meetings for effectiveness.

[353] *See Inter-Agency Pilot Project, supra* note 347, at 1.

[354] *See id.*

[355] *See* Interagency ADR Working Groups, *Pilot Project on Sharing Neutrals*, ADR Network, Vol. II, No. 1, at 1, 12 (June 1994).

[356] *See Inter-agency Pilot Project, supra* note 347, at 1, n.1.

[357] *See Inter-agency Pilot Project, supra* note 347, at 2. Since the mediators are expected to mediate internal EEO complaints, their experience will be somewhat relevant to ADA disputes. *See* ADR Network, *supra* note 356, at 12. The project anticipates expanding the corps of available neutrals by using

The Federal Mediation and Conciliation Service ("FMCS") is an experienced mediation agency.[359] FMCS mediators are stationed around the country, avoiding the geographical problems of using employees located in Washington. There is some debate among mediation scholars, however, as to whether the approach to mediation used successfully in labor disputes is appropriate in civil rights disputes.[360] In labor disputes, the mediated settlement (as well as the non-mediated settlement) reflects the power of the parties. A labor contract negotiation is, in essence, a power contest. By way of contrast, mediation of a civil rights dispute involves the external standards of the statute. On that basis some might be to argue that FMCS mediators are inappropriate for the task of rights-based mediation, at least without some assurance that the mediators could make the transition in mediation approach.[361] FMCS mediators do have some experience in mediation of cases involving statutory civil rights under the Age Discrimination Act.[362] A study of the mediation program found it difficult to evaluate, however, because of the unavailability of data.[363] FMCS mediators would require ADA training.

A second concern about use of FMCS mediators is their availability. Currently, the first priority of the FMCS is mediation of labor disputes. These disputes are likely to continue as first priority, without contrary congressional direction, because of the number of people impacted by such disputes, their immediacy,[364] and the inclinations of the mediators who presumably joined the

---

less experienced mediators as co-mediators, enabling them to gain experience to mediate alone. *See Inter-agency Pilot Project*, *supra* note 347, at 2.

[358] *See Inter-agency Pilot Project*, *supra* note 347, at 1. The mediators will work within a sixty mile radius of Washington, D.C. *Id.*

[359] *See* 29 USC §§172, 173; 42 USC §6103; 34 CFR §110.32; 5 USC §7119.

[360] *See* Moore, *supra* note 319, at 40-42 for a discussion of this debate in general terms. Moore characterizes the debate as a distinction between focus on process, rather than substance. As Moore notes, however, not all labor mediators are of the process school. Some scholars, as well as FMCS representatives, believe that mediation techniques transcend subject matter.

[361] This paper does not attempt to take a position on the debate among mediation scholars on this issue, but merely raises the question. It is important, however, to ensure that the statutory rights are not sacrificed to mediation in a general sense. One way to deal with the concern about mediation approach would be in the assignment of mediators to ADA cases. Information from FMCS.

[362] *See* 42 USC §6103; 34 CFR §110.32

[363] *See* Singer & Schechter, *supra* note 348, at 11, 16, 19. *Cf.* Barrett & Tanner, *supra* note 348, at 752, 754.

[364] Information from FMCS. Even if the FMCS does not mediate ADA cases, the agency might be able to assist in training mediators for the task. Information from FMCS.

agency with a goal of mediating such disputes and are experienced at doing so. Accordingly, without a significant infusion of additional mediators, mediation of ADA cases in a timely manner might be difficult, if not impossible.

The final option is the use of outside mediators. The two pilot projects have trained a group of mediators in ADA issues and the recent Department of Justice grant contemplates training an additional ninety mediators. Because of these three projects a group of mediators trained in both mediation and the ADA exists, and will soon increase in size. Use of outside mediators would minimize training costs[365] and avoid the need to increase government employment. In addition, the group is not limited to Washington, D. C., although at present it is not nationwide. There are, however mediators in many areas of the country that might be trained to mediate ADA cases.[366] The use of outside mediators relinquishes some governmental control over the process and requires agency monitoring of nonemployees to ensure quality work. While the controls that exist for employees, such as evaluation, which may impact pay and promotion, are not present for outside mediators, the desire to continue to mediate may provide a substantial incentive to comply with quality standards. Use of outside mediators furthers the goal of minimizing government bureaucracy through use of the private sector.

Unless a sufficient number of mediators are willing to work pro bono, these mediators must be paid with government funds. Since local civil rights agencies have had some success using pro bono mediators, the possibility should not be overlooked.[367] Pro bono mediation of ADA cases may assist private mediators in increasing their experience and expanding their potential client base. This same advantage may encourage some mediators to handle ADA cases at low cost. The agencies could also explore using grants to existing mediation agencies.[368] These agencies often have sources of volunteer or low cost mediators.[369] Also, there are a number of other ways that mediation could be funded consistent with government spending regulations, limited, of course, by the agencies' budgets.[370]

---

[365] Training of additional mediators might be necessary if the volume of cases is large or if trained mediators are not available in all relevant geographic areas. The EEOC and DOJ Pilot Projects each were limited geographically to several large cities, but the forthcoming training project is expected to be more national in scope.

[366] *See* Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457, 474-80 (1994) (recommending use of community mediation dispute resolution programs for Title III disputes); Comments of South Plains Association of Governments in Response to EEOC Request for Comments, Letter to EEOC from Gene Valentini, September 17, 1993, at 1 (suggesting the use of mediators from federal and local government agencies as a means of handling more cases and fostering accessibility to mediation). These mediators could be accessed through a contractual arrangement with one or more dispute resolution agencies or by maintaining a roster of trained mediators. In addition, the Administrative Conference maintains a roster of neutrals available for use in agency disputes. *See* Administrative Conference of the United States, *Mediation: A Primer for Federal Agencies* 12.

[367] The D. C. Department of Human Rights uses volunteer mediators. Community dispute resolution centers frequently use volunteer mediators quite successfully. *See* Susan J. Rogers, *Ten Ways to Work More Effectively with Volunteer Mediators*, 7 NEG. J. 201 (1991). Rogers' article offers useful suggestions for effective use and motivation of volunteer mediators. Lamont Stallworth, a dispute resolution professional from the Chicago Center for Employment Dispute Resolution has suggested that neutrals may have a professional obligation to take several cases each year pro bono. *See ADR Needed for Civil Rights Enforcement*, 144 Lab. Rel. Rep. (BNA) 284, 284 (November 11, 1993). Lawyers trained in mediation might fulfill pro bono obligations by mediating cases.

Use of each source of mediators will require some training.[371] It goes without saying that the mediators should be trained in mediation skills.[372] In addition, essentials of any training program for ADA mediators include the following. The mediator must have a general understanding of various types of disabilities and the impact that such disabilities have on the lives of individuals.[373] In particular, the mediator must understand the impact of disabilities on the dispute resolution process and the ways to make the mediation accessible to individuals with disabilities.[374] The mediator should have an understanding of the ADA.[375] While the mediator is not a legal advisor to the parties, the mediator must be aware of the legal context in which the dispute arises and the standards that would be applicable if the case were to be litigated.[376] The mediator must be knowledgeable about available resources in the community at the national, state and local level which can aid in reaching a satisfactory settlement.[377] These resources may have ideas for solutions to accessibility or accommodation problems or may offer services that will assist in providing solutions. Use of such resources may make the difference between reaching a settlement and no settlement. Furthermore, in addition to specific ADA training, mediators of statutory civil rights cases need to be aware of mediation techniques for dealing with power imbalances. This issue will be discussed further below.

---

[368] Such grants were used for the pilot projects. Some organizations already have initiated private mediation services for ADA cases. For example, the Trade Winds Rehabilitation Center, Inc. in Gary, Indiana has an ADA mediation program. *See* Trade Winds Rehabilitation Center, Inc., *Northwest Indiana Americans with Disabilities Act Mediation Project* (1995).

[369] *See supra* note 368.

[370] For a discussion of a number of ways to fund the use of neutrals, see George D. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking*, Report to the Administrative Conference of the United States, November 19, 1986, at 877-902. The process is complicated by the fact that a number of different agencies are involved in ADA enforcement and potentially in ADA mediation, should a common corps of mediators be used.

[371] Ensuring that neutrals are qualified is particularly important when the parties do not have a choice as to which neutral to use. *See* Linda Singer, SETTLING DISPUTES 170 (1990) citing the Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications. The SPIDR Commission on Qualifications emphasizes competent performance over formal qualifications such as degrees and specialized training. *Id.*

[372] For one listing of such skills, see Society for Professionals in Dispute Resolution, *Qualifying Neutrals: The Basic Principles*, Report of the SPIDR Commission on Qualifications at 17-19 (1989).

[373] *Targeting Disability Needs, supra* note 115, which was written by the American Bar Association Commission on Mental and Physical Disability Law and the Commission on Legal Problems of the Elderly and published by the American Association of Retired Persons for the National Institute for Dispute Resolution is an excellent source for alerting mediators and mediation programs to issues relating to the ADA and the source of many of the training recommendations herein. *See id.* at 20-28. *See also* SPIDR Commission on Qualifications Report, *supra* note 373, at 2, 3.

[374] *See id.* at 22-37.

[375] *See* SPIDR Commission on Qualifications Report, *supra* note 373, at 19; Lawyers Committee Comments, *supra* note 295, at 3.

[376] Some mediation scholars would suggest that subject matter expertise is irrelevant in mediation. *See* Stephen B. Goldberg, *A Qualified Mediator's Skills Don't Depend on Experience*, NAT'L L.J., April

None of the sources of mediators discussed is unquestionably superior to the others, assuming adequate training and a sufficient number of mediators to handle the cases in a timely fashion. Use of outside mediators, however, may enhance the acceptability of the mediation process to the parties, require less training, and provide necessary geographical diversity. Furthermore, development of a cadre of experienced private ADA mediators may encourage disputants to use mediation without filing charges with the agency, freeing agency resources and reducing governmental enforcement expenditures. As discussed later, however, the agency must retain some control over the process to ensure protection of statutory rights. The issue of protection of rights raises several other issues which must be considered in designing a mediation program. They include the following: 1) agency review and approval of settlements; 2) enforceability of settlements; 3) imbalances of power; 4) the role of attorneys in mediation; 5) the need for and use of experts; and 6) confidentiality.

11, 1994, at C14. An expert mediator could certainly resolve an ADA dispute without ADA expertise. Nevertheless, training in the ADA should be required for several reasons. Under the proposed program, the mediated agreements will be reviewed by the agencies for consistency with the statute. Also, the knowledgeable mediator can assist in settlement by previewing the possible outcomes of a trial, causing the parties to view their case more realistically. *See id.* Finally, because statutory rights are involved, mediators should be sufficiently knowledgeable to alert unsophisticated parties to statutory issues. Thus, training in the ADA should be required, although extensive expertise should not.

[377] *See Targeting Disability Needs, supra* note 115, at 38-49. *Targeting Disability Needs* not only lists resources, but offers suggestions on how such resources might be used. Through the technical assistance programs, the agencies have identified resources as well. *See, e.g.*, Equal Employment Opportunity Commission, A Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act, Resource Directory (1992). The information should be updated on a continual basis. Local area disability rights organizations or government agencies dealing with civil rights or disability issues might have, or be willing to compile, information about local resources for use in mediation. Furthermore, business groups may provide such resources. For example, a number of national companies have formed Project Access, which provides information to businesses on compliance with the ADA and resources for issues relating to employment of individuals with disabilities. *See* Peter David Blanck, *Communicating the Americans With Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co.* 21 (Washington, D. C.: The Annenberg Washington Program in Communications Policy Studies of Northwestern University, 1994).

d. Agency Review and Approval of Settlements

Because the issues involve statutory rights and the mediation referral contemplated is a part of the agencies' process, the agencies should retain a role in the settlements. Whether or not the mediator is an agency employee, the referring agency should review settlement agreements reached in mediation for consistency with the statute, and approve the agreements that meet established criteria.[378] The range of acceptable agreements should be wide, since the facts of cases and the strength of cases varies widely. Nevertheless, to the extent possible, the agencies should ensure that charging parties with strong cases are not being coerced to settle for little because of their lack of power and money, and that respondents are not coerced to pay significant sums to charging parties in frivolous cases to avoid large litigation costs or bad publicity. In addition, this review process can be used to identify repeat offenders who may have systemic discrimination problems that are being settled with individuals. Effective use of agency review for this purpose will help prevent sacrificing the goal of resolution of systemic discrimination to the goal of speedy resolution of individual disputes. Upon discovery of systemic problems, the EEOC and the Department of Justice can utilize their litigation authority to remedy the systemic discrimination.

While review of settlements will add to the agency workload, the reduction in investigations should make up for the additional work. To minimize the added burden the agencies could create either guidelines for settlement approval or settlement agreement forms containing required language.[379] To avoid significant limitations on the creativity of the parties and the mediator, however, guidelines or settlement forms should be extremely flexible, with few rigid requirements. One useful requirement, however, would be language regarding enforcement of the settlement.[380] Development of guidelines regarding settlement could provide other benefits as well. These guidelines could assist the mediator and the parties in determining what appropriate settlements might be. Such a guide would be particularly useful for parties operating without representation in the mediation process.[381]

---

[378] *See* Lawyers Committee Comments, *supra* note 295, at 3. Since the agencies enforcing Titles I, II and III have the authority, on their own or through the Justice Department, to litigate violations of the statute, they also have authority to approve or reject settlements of disputes. The FCC can accept settlements as final judgments or take action to enforce the statute despite the settlement. Information from FCC. The EEOC signed agreements reached through the rapid charge processing procedure. *See* Silver, *supra* note 201, at 579.

[379] The D.C. Department of Human Rights has used a settlement agreement form for mediated settlements. The Federal Transit Administration has established guidelines for voluntary compliance agreements. *See* Informal Compliance Process, *supra* note 332, at Attachment II.

[380] *See* discussion of enforceability *infra*.

[381] To be most useful to the mediator and the parties, the guidelines should include what a full remedy would be if the case were successfully litigated. *See* PEER Study, *supra* note 224, at 152-53. The

Another possible approach is to require the mediator or the parties to submit a brief statement to the agency in support of the proposed settlement agreement. Such a statement could summarize the facts and the factual and legal disputes, providing information that would enable the agency to determine whether to approve the agreement. Given the confidential nature of mediation, agreement of the parties to the statement should be required before the statement is submitted to the agency. Such a requirement might hinder negotiations, however, by requiring negotiations over the statement in addition to the settlement agreement. It is unclear whether agreement to such a statement would be a stumbling block in negotiations and whether it would be valuable to the agency. Thus, the agencies should consider experimenting with this requirement.

e. Enforceability of Mediated Agreements

The goal of mediation is to settle cases. These settlements achieve the statutory goal only if they are enforceable, however. While studies of mediation indicate that compliance with agreements is widespread, a successful mediation program should result in enforceable agreements to help ensure such compliance. Judicial decisions in cases involving enforcement of settlement agreements under Title VII, on which the enforcement provisions of Title I of the ADA are based, have reached varying results. There is disagreement over whether federal courts have jurisdiction to enforce such agreements. Recently, the Tenth Circuit held that an action to enforce a settlement agreement in a Title VII case was an action for breach of contract under state law, over which the federal court had no jurisdiction.[382] Other courts have found such actions to be enforceable under Title VII.[383] Courts have split on whether exhaustion of administrative remedies is required before filing suit to enforce a settlement agreement.[384]

---

risk of such guidelines is that individuals with weak cases and no legal advice might rigidly adhere to unrealistic expectations about settlement.

[382] *See* Morris v. City of Hobart, 39 F.3d 1105 (10th Cir. 1994).

[383] *See* EEOC v. Safeway Stores, Inc., 714 F.2d 567, 573 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984)(conciliation agreement enforceable); EEOC v. Henry Beck Co., 729 F.2d 301, 305 (4th Cir. 1984) (settlement agreement negotiated under rapid charge processing procedures enforceable); James v. Texas Department of Human Services, 818 F. Supp. 987, 990 (N.D. Tex. 1993) (settlement agreement under Title VII enforceable); Sherman v. Standard Rate Data Service, Inc. 709 F. Supp. 1433, 1440 (N.D. Ill. 1989) (same); Kiper v. Louisiana St. Bd. of Elementary and Secondary Educ., 592 F. Supp. 1343, 1359 (N.D. La. 1984) (conciliation agreement enforceable by aggrieved employee). Some courts have recognized a distinction between enforcement of conciliated agreements after a cause finding and enforcement of agreements negotiated prior to determination. *See* EEOC v. Pierce Packing Co., 669 F. 2d 605, 608-09 (9th Cir. 1982) (finding that the EEOC may not seek enforcement of a settlement agreement without investigation and a determination of reasonable cause.) To the extent the courts recognize a distinction, an agreement reached in mediation as contemplated herein would be a predetermination settlement agreement.

[384] *Compare* Blank v. Donovan, 780 F.2d 808, 809 (9th Cir. 1986) (settlement agreement negotiated pursuant to Title VII complaint not enforceable where Title VII administrative requirements

To ensure enforceable agreements, the ADA could be amended to make failure to comply with a mediated settlement agreement unlawful. Barring such amendment, the agencies should be willing to seek enforcement of such agreements in order to make the mediation program a success. If, as is the case in most mediation programs, noncompliance is rare, enforcement will not be a strain on agency resources. The agencies should also support individuals seeking judicial enforcement where requested. As the Fifth Circuit noted in *Safeway Stores*, lack of enforceability would undermine the statutory scheme, allowing respondents to use conciliation to delay and possibly make proof of discrimination more difficult, seriously prejudicing the complainants and the agency.[385] The ADA's encouragement of ADR strongly supports enforceability of mediated settlement agreements. The arguments for enforcement are compelling and should be made forcefully by the agencies.[386]

In addition to active enforcement, the agencies have two other roles to play in the enforcement area. First, review of the agreement should include review for enforceability. As noted above, enforcement language could be drafted by the agencies as a guide for the mediator and the parties. Also, the agreement to mediate should include agreement that any settlement reached is enforceable by the agency.[387] While such agreement would not confer jurisdiction on the federal courts, it would at a minimum allow the agency to seek enforcement on a contractual basis. Second, education about mediation should include information about enforcement of mediated agreements so the decision about whether to mediate is an informed one.

f. Power Imbalances

Because mediations in ADA cases often will involve an individual with a disability and a business or government entity, concern about power imbalances surfaces. Because of historic discrimination and lack of resources, the complainants may be at a disadvantage in this informal procedure.[388] All power imbalances cannot be eliminated and certainly, they are present in investigation

---

have not been exhausted) and Parsons v. Yellow Freight Sys., 741 F.2d 871, 874 (6th Cir. 1984) (same) *with* Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1508 (11th Cir. 1985) (no exhaustion required prior to enforcement action based on conciliation agreement) and Sherman v. Standard Rate Data Service, Inc. 709 F. Supp. 1433, 1440 (N.D. Ill. 1989) (exhaustion of administrative remedies not required before action to enforce Title VII settlement agreement).

[385] 714 F.2d at 573.

[386] Questions about enforceability may discourage participation in the process.

[387] The mediated settlement agreements in the EEOC pilot project were enforceable by the agency. R. Gaull Silberman, Susan E. Murphy, & Susan P. Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1557 (1994).

[388] In a given case, however, the disadvantaged party might be the small employer faced with a disability rights organization.

and litigation as well as mediation. Nevertheless, steps can and should be taken to ensure that power imbalances do not adversely affect either party in ways unique to mediation.[389]

There is a debate in the dispute resolution community with respect to the role of the mediator which affects this issue.[390] One view of mediation limits the role of the mediator to obtaining a settlement on any terms agreeable to the parties. Under this view, the mediator should not impose upon the parties his or her own view of the merits of the case, the merits of any proposals offered, or the merits of the settlement reached. Under an alternative view, the mediator plays a more active role in informing the parties of the applicable law and attempting to settle the dispute in light of the legal rights of the parties. The clear view of some is that the latter approach, identified as "rights-based mediation," is most appropriate for ADA mediation.[391] A third view is that where the goal is efficiency or protection of rights, mediation is not the most appropriate vehicle for dispute resolution.[392] Instead, mediation is effective and should be used where the goal is empowerment.[393] This report does not attempt to resolve, or even enter, this debate. As proposed here, mediation attempts to further all three goals — efficiency, protection of rights, and empowerment of the parties.

Mediation in the statutory rights context should not be undertaken without awareness of the statutory rights by the parties and the mediator, however. Accordingly, the agencies' education role should include education about statutory rights and remedies.[394] Such education can go far to correct power imbalances that result from lack of knowledge or information. Additionally, education of the mediators about statutory rights and disabilities will reduce problems of mediator bias. Furthermore, there are mediation techniques that can be used to deal with imbalances of power while remaining neutral, as the mediator is required by ethical standards to do.[395]

---

[389] While prejudice certainly is not unique to mediators, the informality of mediation may increase the chance that these prejudices have an influential impact. *See* Delgado, et al., *supra* note 271, at 1386. Mediation lacks certain protections against acting on bias that are present in the judicial setting. *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1588-90 (1991).

[390] For discussions of these views of mediation, see Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259-62 (1989); Moore, *supra* note 319, at 34-35, 40-42.

[391] *See Targeting Disability Needs*, *supra* note 115, at 9-10.

[392] *See* Bush, *supra* note 391, at 262-66.

[393] *See id.*

[394] *See supra* notes 335-42 and accompanying text. This education can be accomplished primarily through written materials, many of which have already been created by the agencies' technical assistance programs. The recent Department of Justice grant for mediator training, for example, contemplates the development of a consumer's guide to mediation. The key is insuring party access to these materials through an organized effort by agency personnel.

[395] *See Targeting Disability Needs*, *supra* note 115, at 30-31; Moore, *supra* note 319, at 280-82.

In addition to use of adequately trained mediators, monitored to ensure acceptable performance, the agencies can assist in this process by encouraging parties to bring a representative or advocate to the mediation.[396] One trained group of potential advocates for complainants exists as a result of the joint EEOC/DOJ training. The training could be repeated or expanded, and technical assistance grants could be used to encourage disability and business organizations to provide such training as well.[397] In addition, the agencies might consider maintaining lists of organizations providing advocacy services for the use of parties seeking representation.[398] An alternative is a staff person knowledgeable about the ADA who could serve as a resource for unrepresented parties. The staff person should be someone who will have no role to play in the mediation, investigation or litigation of the case, however. The individual should be limited to providing information, and barred from giving legal advice.[399] One or more of the individuals who do initial screening of cases could perform this function. In addition to the efforts mentioned, the agencies should carefully monitor settlements reached through mediation to ensure that neither party is disadvantaged by the mediation process.[400]

---

[396] *See Targeting Disability Needs, supra* note 115, at 30.

[397] Some training efforts have been initiated already. For example, in February 1995 the Department of Rights of Virginians with Disabilities presented a self advocacy workshop on titles II and III of the ADA designed to teach individuals with disabilities, family members and advocates about ADA rights and responsibilities to enable them to achieve compliance for themselves and others with disabilities. Information from program brochure for *Access to Programs and Services: A Self Advocacy Workshop on Titles II & III of the Americans with Disabilities Act (ADA).*

[398] *See* PEER Study, *supra* note 224, at 184. At one time, the EEOC maintained lists of attorneys for referrals of charging parties. Where one party has an attorney and the other does not, the party without legal representation may be at some disadvantage. In a given dispute, either party could be disadvantaged by lack of representation. *See* Comments of the Eastern Paralyzed Veterans Association Concerning the Equal Employment Opportunity Commission Request for Comments Regarding Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures, September 10, 1993, at 2; Comments of National Federation of Independent Business in Response to EEOC Request for Comments, Letter from John J. Motley, III, September 22, 1993, at 1. Some systems have limited the role of attorneys to minimize this problem, and avoid legalization of the process. *See* Moore, *supra* note 319, at 107-08; Grillo, *supra* note 390, at 1597; PEER Study, *supra* note 224, at 36. The better approach would allow attorneys, however, encouraging the unrepresented party to obtain representation or using mediation techniques to balance the power differentials. Lawyers may serve as protectors of rights and provide a buffer between adverse parties. Grillo, *supra* note 390, at 1597-1600. There is insufficient research to indicate whether lawyers help or hinder settlement prospects. Moore, *supra* note 319, at 108.

The EEOC Pilot Program revealed a concern for fairness on the part of the parties where the other party appeared with an unanticipated representative. The outside evaluator recommended that the agency develop criteria for who may participate in a mediation session and at what point such decisions must be made. *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 5. While barring attorneys is not recommended, guidelines as to the number of representatives permitted and a time limit for notifying the mediator of such representatives are appropriate. Each party should then be notified as to who will be representing the other party to avoid surprises and resulting fairness concerns.

[399] This function might also be performed by technical assistance staff. Use of staff personnel for such a function might generate accusations of agency bias, however.

g. Confidentiality

Another question, mentioned briefly above, is whether the mediation is confidential or whether the information revealed in mediation is available to the agency for its investigation should mediation fail. Allowing the use of information from the mediation for investigative purposes would conserve resources, since the investigator would not have to duplicate the mediator's efforts. Balanced against this efficiency goal is the impact of lack of confidentiality on settlement. A party might be unwilling to disclose information that might aid in settlement if the information could be used in the investigation to the party's detriment.[401] Candid participation in mediation increases the probability of settlement.[402] Additionally, confidentiality minimizes the possibility that a party will participate in mediation only as a form of discovery.[403] Also, the confidentiality of mediation may be an incentive for the parties to choose mediation over litigation.[404]

The Administrative Dispute Resolution Act requires confidentiality in dispute resolution proceedings, with limited exceptions.[405] It might be argued that mediation in the course of investigation, like that conducted under the rapid charge processing procedure, is not a dispute resolution proceeding covered by the Act. Even if such an argument were to prevail, however, the rationale supporting the Act's confidentiality provisions is persuasive, outweighing efficiency concerns, and should be followed in the mediation process recommended here.[406] Nevertheless, confidentiality should not bar agency review of the settlement agreement recommended above.

h. Technical Experts

ADA mediation may require the use of technical experts to facilitate settlement. Engineers, architects, rehabilitation experts, and experts in particular disabilities are among those whose expertise might be required in a given case. Training of mediators in resource availability will aid in bringing expertise into mediation. Selection of mediators with expertise is another method. In labor arbitration, the parties to a dispute requiring technical expertise frequently select an arbitrator with such expertise. Agencies should seek to ascertain whether mediators have such expertise and assign cases to them on that basis. In addition, regardless of the mediator source utilized, the agencies should encourage individuals with the required expertise to train as mediators. Government employees with related training, knowledge and/or experience could be encouraged to train as mediators. Technical assistance grants or FMCS could be used for such training.[407]

---

[400] *See* EEOC Report on ADR Pilot Project, *supra* note 100, at 5 where the outside evaluator recommended such monitoring.

[401] *See* Philip J. Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 324 (1989).

[402] *Moore*, *supra* note 319, at 160; Singer, *supra* note 333, at 171-72. The parties need to know that information disclosed to the mediator in caucus sessions will not be disclosed to the other party absent authorization. *See* Recommendation 88-11 of the Administrative Conference of the United States, 41 ADMIN. L. REV. 357, 358 (1989).

[403] *See id.*

[404] *See* Folberg, & Taylor, *supra* note 265, at 35; Singer, *supra* note 333, at 172.

[405] *See* 5 USC §574.

[406] For a thorough discussion of confidentiality issues, see Harter, *supra* note 402.

Where the mediator is not the source of expertise, cost of the expert becomes an issue. While the parties to the dispute could agree to use and pay an expert, provision of technical assistance at no cost would facilitate resolution of the dispute in many cases.[408] While some assistance is available pro bono, other experts charge for their services. To facilitate settlement, the agencies could utilize several methods of obtaining experts. As in the case of mediators, some experts, both within and outside the government, might provide services at little or no cost.[409] Alternatively, the agencies could set aside funds for technical assistance on an ad hoc basis where deemed necessary by the mediator. A third alternative is to employ one or more trained experts to be utilized in mediation. The problem with the latter alternative is the difficulty of finding one or even several individuals with expertise in the broad range of areas likely to be needed in ADA disputes. To the extent possible, however, expertise should be available at minimal cost to the parties.

i. Monitoring and Evaluation

The proposal for a mediation program set forth above is based on the best current information available. The key to a successful program, however, is continued monitoring, evaluation, and revision where necessary to accomplish the goals of the program.[410] The broad goals of any change in the dispute settlement process, as set forth above include effective enforcement of the statute and speedy and efficient resolution of disputes. The mediation program should be evaluated against these broad goals.

---

[407] As a part of the training, the technical experts could serve as co-mediators, providing their expertise while learning mediation techniques.

[408] For example, the actual construction cost of making a business accessible might be small, but an architect might be needed to determine how to access the facility most easily and to draw up plans for doing so. Without the architect's expertise, the parties may be unaware of the low cost option for accessibility and unwilling to pay for the architect's services without some assurance that a resolution of the dispute will result.

[409] The agencies could work out a worksharing arrangement with government agencies employing individuals with relevant technical expertise.

[410] *See* Administrative Conference of the United States, *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists* 55-58 (1992) (evaluating ADR programs); Administrative

The recommended mediation program could be initiated as a larger pilot program than has been tried thus far, encompassing a range of ADA cases. Such a pilot would permit the agencies to try the mediation proposal on a limited, low cost basis. The proposed pilot would add to the information provided by the EEOC and DOJ pilot programs in several ways. The EEOC program analyzed all cases mediated, revealing limited information about mediation of ADA cases. In addition, because the only issues mediated were discharge, discipline, and terms and conditions of employment, the program excluded many ADA cases from mediation, including reasonable accommodation cases, which would appear to have significant potential for mediated solutions. The DOJ pilots will mediate few, if any, Title II cases, and no mediation program has included Title IV cases. Thus, an additional pilot would enable more accurate assessment of the effectiveness of mediation for various types of ADA cases. As a result, any permanent program could be targeted at those cases in which mediation is most effective. In addition, the proposed program will test the efficacy of using a common group of mediators for all ADA cases.

Alternatively, based on the previous pilot programs[411] and other mediation research set forth in this report, the program could be implemented on a larger scale, with careful monitoring and evaluation to allow modification for effectiveness. Given the EEOC's forthcoming mediation program, initiation of the joint ADA program recommended seems appropriate.

In order to add to the information provided by the existing pilot programs, the proposed program should be structured to enable empirical evaluation based on specific criteria established prior to the commencement of the program.[412] These criteria should be developed with the assistance of the recommended advisory committee. Employment of a professional evaluator, similar to the EEOC pilot program, will assist in creating an evaluation system that will provide the data necessary to determine whether mediation meets the statutory goals and will be cost effective on a larger scale.[413]

Conference of the United States, Dispute Systems Design Working Group, *Performance Indicators for ADR Program Evaluation* (November 1993). For a useful guide for evaluation, see Elizabeth Rolph & Erik Moller, *Evaluating Agency Alternative Dispute Resolution Programs: A Users' Guide to Data Collection and Use* (1995).

[411] If completed as anticipated, the prior pilots will mediate 850 ADA cases and 267 employment discrimination cases, some of which were ADA cases.

[412] *See Designing Systems*, *supra* note 296, Section I, at 8-9.

[413] As noted in *Implementing the ADR Act*, *supra* note 411, at 58, evaluation issues should be considered in planning the pilot project.

The evaluation process should include the parties, the mediators, and agency personnel at all levels who have any involvement with the process.[414] Data collected from the program results should include: the settlement rates, both overall and by type of case, use of party representatives and use of technical expertise; party satisfaction, again overall and broken down by type of case and representation; comparison of mediated settlements with settlement guidelines, settlements reached through other processes, and litigation results;[415] an assessment of mediator quality;[416] the impact on systemic litigation; any changes in the case backlogs; the comparative processing time of mediated cases and other cases; the rate of compliance with the mediated agreements; agency approval rates of mediated settlements; and the relative costs and benefits of the mediation project.[417] Collection and analysis of these data should assist in answering the following questions: 1) whether the mediation program is consistent with statutory goals; 2) whether the mediation program adversely impacts systemic litigation of ADA issues; 3) whether the mediation program reduces case processing time and the backlog; 4) whether mediation reduces the cost of case processing for the parties and/or the government; 5) at what point in the investigative process is mediation most effective; 6) whether mediation is more effective for certain types of cases; 7) whether mediation disadvantages disabled individuals or other historically disadvantaged groups; 8) whether the process is equally fair and effective for represented and unrepresented parties; 9) whether the results of mediated settlements, settlements reached through other processes and litigation in similar cases are comparable; 10) what are the best sources of qualified mediators; 11) whether the parties comply with mediated settlements; 12) whether a common group of mediators is effective in handling disputes under the various titles of the ADA and achieves promised efficiency; 13) whether availability of technical expertise affects settlement; and 14) whether agency approval of mediated settlements is effective and necessary. In addition, the program can test some of the specific proposals set forth herein for effectiveness, providing a basis for retaining or altering them in the future.[418]

---

[414] *See* EEOC Report on ADR Pilot Program, *supra* note 100, at 5, 6; PEER Study, *supra* note 209, at 13.

[415] This comparison will facilitate the determination of whether particular groups are being disadvantaged by mediation.

[416] For useful discussions on selection and evaluation of mediators, see Christopher Honeyman, *Five Elements of Mediation*, 4 NEG. J. 149 (1988); Christopher Honeyman, *On Evaluating Mediators*, 6 NEG. J. 23 (1990). *See also* SPIDR Commission on Qualifications Report, *supra* note 373.

[417] These criteria should incorporate the question of whether settlements are reached in cases in which mediators believe that discrimination occurred. *See supra* note 114 and accompanying text. The mediation program should not be a means by which individuals obtain relief to which they would not be entitled under the statute from respondents desirous of avoiding litigation and bad publicity. Nor should it allow respondents who have violated the law to settle a case cheaply to the disadvantage of the complainant. Instead, it should provide rapid, effective relief for complainants whose rights have been violated. Additionally, if mediation resolves only those cases that would otherwise settle in the investigation process, then it adds little of benefit, unless early settlement saves investigation resources at least equivalent to the resources expended in mediation.

This analysis of the program, along with analyses of the other pilots, will establish a base of knowledge that will enable design of the most effective continuing mediation program. In addition, if the programs demonstrate that mediation is a fair and satisfactory method of resolving disputes, parties in the future will be encouraged to participate in mediation in greater numbers. This may lead not only to expansion of agency-sponsored mediation, but to the growth of private mediation of ADA disputes as well, reducing agency caseloads without detracting from statutory goals. A determination of whether mediation disadvantages disabled individuals is particularly important in ensuring that the statutory goal of elimination of discrimination is not compromised by mediation and in encouraging complainants to participate in mediation.

An important caveat is that the evaluation of the program and evaluations of mediators, whether agency employees or outsiders, should avoid overemphasis on settlement rates. The goal of statutory enforcement should not be outweighed by the goal of settlement, which is probable if settlement rate is the crucial factor in evaluations. Because settlement is the goal of mediation, mediators will measure their own success by settlement. The agencies should counterbalance the resulting tendency to push for settlement at all costs by reassuring mediators that there are cases that will not, and should not, settle, and recognizing that fact in the evaluation.

Furthermore, systematic evaluation on an ongoing basis should be continued throughout the program. Such evaluation will provide the data needed to alter the program as necessary for successful mediation, or to eliminate it if it no longer meets its goals.

4. Other Uses of ADR

Adoption of a mediation program should not end ADR efforts of ADA agencies. As noted above, the use of ADA mediation by the agencies is likely to spur private mediation, particularly if private mediators gain experience in ADA mediation through a government program.[419] The agencies could continue to use technical assistance to encourage organizations such as dispute resolution centers to establish ADA mediation programs.[420] Growth of private mediation will reduce dependency on government resources for statutory enforcement.

---

[418] The program could use several sources of mediators and compare their effectiveness or evaluate the impact of the educational programs on participation rates and power imbalances. The pilot might vary the timing of mediation in the investigation process and compare the effectiveness of mediation when used earlier and later in the investigation process.

[419] For an article supporting the use of private mediation in Title III cases, see Hermanek, *supra* note 367. Agency review of privately mediated settlements is discussed in Section IV(4)(a) *infra*.

a. Arbitration

In addition to mediation, private arbitration is growing, particularly in the employment arena.[421] The growth in arbitration was spurred by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[422] In *Gilmer*, the Court held that an individual employee who had signed an arbitration agreement as a part of his application for registration with the New York Stock Exchange was bound to arbitrate a statutory claim of age discrimination.[423] The *Gilmer* Court, following a recent trend in the Court favoring arbitration of statutory disputes, rejected the argument that arbitration is procedurally and substantively inadequate to resolve such disputes.[424]

Gilmer was based on the Federal Arbitration Act, which "reflects a 'liberal federal policy favoring arbitration agreements.'"[425] Commentators on *Gilmer* have speculated about whether it will be applied to require arbitration under employment agreements, since the Federal Arbitration Act states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[426] Lower federal courts have disagreed about the scope of the exemption.[427] With respect to the ADA, the legislative history supports a conclusion that an arbitration agreement should not preclude a statutory forum.[428] Regardless of how the courts decide the issue, the agencies will be faced with the question of whether to investigate and litigate cases where a private ADR proceeding has been conducted or agreed upon. The Court in *Gilmer* expressly noted that Gilmer's agreement to arbitrate did not preclude his filing of an EEOC charge or EEOC involvement in combating discrimination.[429]

---

[420] The Department of Justice grant is one example of how such a grant might be used.

[421] *See, e.g.*, Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: A Budding Partnership*, 48 ARB. J. 53, 53 (1993); Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMP. REL. L.J. 205, 205, 216-17 (1993).

[422] 500 U.S. 20 (1991).

[423] *Id.* at 26.

[424] *Id.* at 27-32. The Court did examine the arbitration procedures at issue, however, finding them satisfactory, *id.*, thus suggesting that in the absence of certain protections, arbitration of statutory claims might inadequately protect statutory rights.

[425] *Id.* at 25, *quoting* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

[426] 9 USC §1 (1988). For discussions of this issue, see, e.g., James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 107-14 (1993); Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 792-94 (1992); James A. Burstein & Kenneth D. Schwartz, *Gilmer v. Interstate/Johnson Lane Corporation: The Supreme Court Endorses Arbitration of Age Discrimination Claims*, 17 EMP. REL. L.J. 173, 181-83 (1991); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 753-54 (1990).

[427] *See* Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 78 (D.C. Mass. 1993) (insurance sales agent required to arbitrate gender discrimination claim pursuant to arbitration clause in her agent contract, which is not excluded under FAA exemption for employment contracts); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1438 (N.D. Ill. 1993) (lawyer required to arbitrate claim of race, gender and religious discrimination because agreement not excluded under FAA exemption for employment contracts); Dancu v. Coopers & Lybrand, 778 F. Supp. 832 (E.D.Pa. 1991), *aff'd without published opinion*, 972

Substantial concern has been expressed over the impact of agreements to arbitrate employment discrimination claims.[430] Arbitration may be imposed on unwilling or unknowing employees.[431] Additionally, the statutory rights and remedies may be unavailable in arbitration.[432] For example, arbitration may

---

F.2d 1330 (3d Cir. 1992) (narrow reading of employment contract exemption); United Electrical, Radio and Machine Workers v. Miller Metal Products, 215 F.2d 221, 224 (4th Cir. 1954) (exclusionary clause exempts all employment contracts from FAA coverage); American Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (collective bargaining agreements are contracts of employment within the meaning of the FAA exemption).

[428] *See* Legislative History, *supra* note 307, at 516-17 ("The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities"); Hayford, *supra* note 286, at 15-17 and authorities cited therein. In *Alexander v. Gardner-Denver*, the Supreme Court held that an employee was entitled to pursue an action in federal court alleging race discrimination under Title VII despite an arbitration decision finding that he was discharged for just cause. 415 U.S. 36, 44 (1974). The issue of race discrimination had been raised before the arbitrator, but was not mentioned in the decision. 415 U.S. at 42. The Court found that the employee was entitled to a trial de novo because the two proceedings differed significantly. *Id.* at 52. The *Gilmer* Court distinguished the *Gardner-Denver* decision on several grounds. 500 U.S. at 33-35. First, the employees there, unlike Gilmer, had not agreed to arbitrate statutory claims and thus, the arbitrator had no authority to resolve such claims. Second, the Court noted the absence of the tension between collective and individual rights in *Gilmer*, which involved a nonunion workplace. The final differentiating factor was that the *Gardner-Denver* case was decided under Title VII, not the Federal Arbitration Act. The ADA was passed before *Gilmer* was decided, however. *See* Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 92 (1993).

[429] 500 U.S. at 28. It is not clear, however, what the impact of a private arbitration award or settlement would be on the EEOC's ability to obtain individual relief. *See* Livingston, *supra* note 429, at 95-96.

[430] Several members of Congress have introduced legislation to overturn the *Gilmer* decision and bar employers from requiring arbitration of discrimination claims. *See* H.R. 4981, 103d Cong., 2d Sess.; S. 2405, 103d Cong., 2d Sess.; *Legislation Bans Mandatory EEO Arbitration*, 146 Lab. Rep. Rep. (BNA) 561 (August 29, 1994).

[431] *See* Jennifer R. Dowd, *Enforcing Arbitration Agreements in Age Discrimination Suits: Gilmer v. Interstate Johnson Lane Corp.*, 33 B.C. L. REV. 435, 455 (1992); Legislation Bans Mandatory EEO Arbitration, *supra* note 403, at 562. The Court in *Gilmer* rejected the argument that unequal bargaining power required a holding that employment arbitration agreements are not enforceable. 500 U.S. at 33. The court indicated, however, that fraud or overwhelming economic power might justify a refusal to enforce the agreement. Id.

[432] *See* Peter M. Panken, Stacey R. Babson & Robert Webb, *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, C779 ALI-ABA 63, 72 (Lexis) (1992).

eliminate discovery[433] or restrict the arbitrator's authority to award damages. In addition, some arbitrators may be inclined to favor employers, since employers are likely to be repeat customers, while employees are not.[434] The agencies should be alert to these concerns in deciding whether to proceed in a case where an arbitration agreement exists. In addition, some of the same concerns exist with respect to settlement agreements reached through private mediation. These cases will reach the agencies when the charging party, dissatisfied with the arbitration decision, private arbitration or mediation agreement, or mediated settlement, files a charge.

In considering the appropriate approach to these cases, the agencies might look to the National Labor Relations Board precedent in deferral to arbitration. The NLRB has a policy of deferral to arbitration in cases where the unfair labor practice claim filed with the NLRB overlaps with a contractual right subject to arbitration.[435] The NLRB will defer to an arbitrator's award which meets its *Spielberg* standards, which require fair and regular proceedings to which all parties agreed to be bound, and a decision which is not repugnant to the purpose and policies of the statute.[436] Additionally, the issue in the unfair labor practice case must have been presented to and considered by the arbitrator, a criterion which is met if the contractual and statutory issues are factually parallel and the arbitrator was presented generally with the facts relevant to the unfair labor practice.[437] The requirement that the proceedings be fair and regular has been interpreted to incorporate minimum due process standards,[438] while the absence of repugnancy to the statute means not "palpably wrong as a matter of law."[439]

The NLRB also defers to arbitration where the arbitration pursuant to the agreement has not yet occurred, but retains its right to review the award under the *Spielberg* standards.[440] The criteria for prearbitral deferral, first articulated in *Collyer Insulated Wire*, are as follows: 1) the parties must have an established and productive collective bargaining relationship; 2) the parties must be willing to arbitrate the dispute; and 3) the meaning of the contract must be central to the dispute.[441] In addition to deferring to arbitration awards, the NLRB has deferred to prearbitration settlements.[442] The NLRB's deferral policy has been controversial, particularly prearbitration deferral, and the agency has expanded and contracted the cases subject to deferral over the years.[443] Critics of the policy have argued that the NLRB has abandoned its duty to enforce statutory rights.[444] The agency's rationale for deferral includes furthering the national labor policy favoring arbitration, requiring the parties to use their agreed-upon method of dispute resolution, deferral to arbitral expertise in contract interpretation, and conservation of the agency's resources.[445]

---

[433] *See* Jenifer A. Magyar, *Statutory Civil Rights Claims in Arbitration: An Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 655 (1992).

[434] *See* Panken, *supra* note 433, at 72-73; *AAA President Predicts Upswing in Use of ADR*, Individual Employment Rights (BNA), July 20, 1993 at 3. If the employer is paying the cost of the arbitration, that fact might influence the arbitrator as well, subconsciously if not consciously.

[435] *See* Patrick Hardin, et al., *The Developing Labor Law* 1016-17 (1992).

[436] *See* Spielberg Manufacturing Co., 112 NLRB 1080 (1955).

[437] *See* Olin Corp., 268 NLRB 573 (1984).

[438] Hardin, *supra* note 436, at 1061.

[439] Inland Steel Co., 263 NLRB 1091, 1091 (1982).

[440] *See* United Technologies Corp., 268 NLRB 557 (1984).

[441] *See* Collyer Insulated Wire, 192 NLRB 837, 842 (1971)

Where the statute does not mandate investigation of each charge filed, the agencies have the authority to allocate investigative resources, declining to investigate cases where a resolution of the matter was reached in another forum. The same is true where agency litigation is discretionary, which is the case under Titles I, II and III. The requirement of a Title II investigation could be met through the review of the arbitrator's award or mediated settlement and any evidence the parties desired to present supporting their claim that the resolution was inconsistent with the statute. Such review under Title IV would also serve to determine whether the statutory requirements were met and thus whether the dispute resolution could be accepted by the agency as a final judgment in the matter.[446]

Because the NLRA provides no private right of action, deferral by the agency is a final determination of the charging party's case. By contrast, under Titles I, II, and III of the ADA, an agency determination not to proceed based on an arbitral award or settlement does not preclude judicial action by the employee.[447] Nevertheless, the agencies should approach deferral with caution. The benefits of deferral are similar to those under the NLRA, but the balance of power may be quite different. Deferral to a union negotiated arbitration procedure leaves the dispute to be resolved through a procedure agreed upon by two relatively equal parties. In a discrimination dispute, the arbitration agreement may well have been imposed on an employee with little knowledge of the consequences and little effective bargaining power.[448] In addition, there may be an imbalance in representation of the parties. Thus in considering deferral, the agencies should emphasize, whether on an ad hoc basis or through regulatory guidelines, criteria that ensure fairness to all parties.[449]

---

[442] *See* Plumbers & Pipefitters Local Union 520 v. NLRB, 955 F.2d 744 (D.C. Cir.), *cert. denied*, 113 S. Ct. 61 (1992) (court upheld NLRB's authority to defer to settlement agreements where the settlement was reached through a collective bargaining process that was fair and regular, the parties agreed to be bound by the settlement, the outcome was not "palpably wrong" in that both sides compromised to some degree, the unfair labor practice and contractual issues were factually parallel, and both parties were generally aware of the relevant facts.

[443] *See generally* Hardin, *supra* note 436, at 1017-68. *See also* Plumbers & Pipefitters Local Union 520 v. NLRB, 955 F.2d at 746 (criticizing the NLRB for lack of a coherent rationale for its policy deferring to prearbitral settlements).

[444] *See, e.g.*, the dissents of Members Fanning and Jenkins in *Collyer*, 192 NLRB at 847-50.

[445] *See Collyer*, 192 NLRB at 839; United Technologies, 268 NLRB at 558, 559, citing United Aircraft Corp., 204 NLRB 879 (1973), *enf'd sub nom.*, Machinists Lodges 700, 743, 1746 v. NLRB, 525 F.2d 237 (2d Cir. 1975).

[446] As noted, these issues, particularly those involving agreements to arbitrate, are most likely to arise in employment discrimination cases. In communications and transportation cases, the statute sets forth clear minimum standards that must be met and there is little flexibility for either a mediated or arbitrated solution. If such a proceeding took place, the agency substantive review of the resolution would be relatively straightforward because the statutory standards are specific.

[447] If courts follow *Gilmer*, however, the action may be effectively precluded.

The agencies should consider developing and publishing the criteria that it will consider in determining whether to take action in cases where an arbitration or mediation agreement has been executed by the parties.[450] The criteria should include the circumstances under which the agency will defer action on the case until the dispute resolution mechanism is completed.[451] Publication of such criteria would aid the parties in establishing arbitration and mediation procedures that would survive agency scrutiny. Encouraging fair procedures would promote efficiency by increasing the number of cases in which the agencies could decline to act on the basis of a private dispute resolution. In addition, it would serve the goals of the statute by encouraging employers and businesses to establish dispute resolution mechanisms that would fairly consider claims.[452]

The NLRB's criteria provide a starting point. The mediation or arbitration procedure should be truly voluntary, fair and regular, and provide the rights and remedies that would be available in a statutory proceeding.[453] Procedures imposed on all employees as a condition of employment should be suspect, but not automatically rejected. Fairness should include the notice of the procedures, right to representation, a neutral arbitrator or mediator chosen by both parties with equal knowledge of the backgrounds of the candidates, a right to at least some discovery,[454] a right to compel witnesses, and a written opinion.[455] All remedies available under the statute should be available to the arbitrator.

---

[448] *See* Prudential Ins. Co. v. Lai, 66 FEP Cases (BNA) 933 (9th Cir. 1994) where the court refused to enforce an agreement to arbitrate on the basis that the plaintiff employees did not knowingly waive their right to a judicial forum. Deferral of individual discrimination cases under the NLRA also has been more controversial than deferral of cases involving disputes over changes in working conditions. *See* Hardin, *supra* note 436, at 1022-25.

[449] These cases are most likely to arise in the employment context.

[450] *See* Estreicher, *supra* note 427, at 790. Because the issue is most likely to arise in employment cases, the development of such guidelines should be a higher priority for the EEOC than for other enforcement agencies. The other agencies could defer action unless and until the issue arises with some frequency.

[451] Given the current backlogs at all agencies other than the FCC, deferral will not cause substantial investigative delays.

[452] Pursuant to its statutory authority, 15 USC §2310, the Federal Trade Commission has established minimum requirements for informal dispute resolution procedures which must be exhausted by consumers prior to judicial action. *See* 16 CFR Part 703.

[453] Many of the criteria set forth are relevant only to arbitration, where the neutral has the authority to impose a decision on the parties.

In addition, like the NLRB, the agency should do a substantive review to ensure that the discrimination issue was actually considered by the arbitrator[456] and that the decision or settlement is not inconsistent with the statute.[457] Finally, the agency should ensure that the case does not involve systemic issues which were ignored or not adequately treated in the arbitration or mediation. Where the award or settlement meets these criteria, the agency should decline to proceed further with the investigation and should not litigate the case. If the award or settlement does not meet the criteria, the agency might still decline to proceed further based on other adequate grounds.[458] This procedure will encourage private dispute resolution and conserve resources without diminution of protection of statutory rights.

b. Other Forms of ADR

The agencies should remain alert to other opportunities to use ADR. Litigation of ADA cases may provide opportunities for other ADR methods such as summary jury trials[459] or early neutral evaluation.[460] Agencies should also keep in mind that ADR may be used creatively in settlement of large systemic cases. For example, if a settlement requires ongoing action by the defendant, the agreement could include use of ADR to resolve disputes that arise over the course of implementation of the settlement.[461] The potential for ADR is limited only by lack of creativity in its use and consistency with statutory goals.

---

[454] If the discovery were required to be as extensive as in litigation, one of the advantages of arbitration would be lost. Nevertheless, a party, typically the employee, should not lose the case because of inaccessibility of necessary evidence. An example of such evidence would be comparative data regarding treatment of similarly situated employees to establish discrimination.

[455] The final report of the Dunlop Commission encourages development of private arbitration for employment disputes and sets forth many of these same criteria for fairness. *See* Dunlop Commission Final Report, *supra* note 122, at 25-34. The Commission recommends that employers not be permitted to make agreement to arbitrate public law claims as a condition of employment.

[456] Actual consideration, rather than factual parallelism is a preferable standard and one used by the NLRB before the *Olin* decision. *See Suburban Motor Freight*, 247 NLRB 146 (1980).

[457] Consistency should require application of appropriate legal standards, but mere recitation of the proper standard should not be sufficient for deferral. Many arbitrators have little or no expertise in statutory discrimination. In a 1975 survey of members of the National Academy of Arbitrators, only half of respondents indicated that they stayed abreast of Title VII law and only 14% believed that they could accurately define basic employment discrimination terms. *See* Harry Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study,* 28 Proceedings of the National Academy of Arbitrators 59 (1976), cited in Laura J. Cooper & Dennis R. Nolan, LABOR ARBITRATION: A COURSEBOOK 75 (1994). Nevertheless, 72% of respondents felt competent to decide legal issues in discrimination cases. *See id.* Furthermore, arbitrators in employment discrimination cases do not have the political or personal accountability of judges and therefore, caution should be exercised in deferring to their interpretations of the law. Malin & Ladenson, *supra* note 254, at 1230-38. Careful review of conclusions of law still preserves the benefits of deferral as many cases turn on factual issues, where deference will be greater.

The suggestion of the Dunlop Commission that the EEOC implement a training program and adopt standard training requirements for arbitrators hearing discrimination cases is valuable and would go far in addressing this problem and insuring that cases would survive a substantive review by the agency. *See* Dunlop Commission Final Report, *supra* note 122, at n.13.

[458] For example, the Department of Justice might decline to litigate because the case did not involve a pattern or practice of discrimination or an issue of general public importance.

V. Conclusion

The ADA enforcement agencies are working to achieve effective dispute resolution under the statute. With the exception of Title IV, agency enforcement is marked by large investigative backlogs and long delays. The significant resource investment required to establish an administrative adjudication solely for ADA cases does not promise sufficient benefit in resolving these problems. Additional resources would be better allocated to systemic litigation and establishment of an alternative dispute resolution system for ADA cases. A joint voluntary mediation program should be established by the agencies, after consultation with an advisory committee of representatives of potential disputants, to provide an alternative for parties to ADA disputes. This mediation program could operate effectively as part of an early intervention program, which identifies, in the intake process, cases appropriate for various types of investigation, ADR, and litigation.

Mediation promises quicker resolution of disputes with high satisfaction levels and empowerment of the parties, reducing the governmental enforcement burden. The proposed mediation program should be carefully monitored, evaluated, and modified as necessary, to ensure that the program is achieving the promised benefits, improving enforcement of the statute and moving the nation forward in its goal of eliminating discrimination against individuals with disabilities. In addition, the agencies should look for other opportunities to use ADR creatively to achieve enforcement goals.

---

[459] A summary jury trial involves abbreviated presentation of the case to a nonbinding jury.

[460] Early neutral evaluation involves a neutral assessment of the merits of the claim and is designed to narrow and define issues as well as to facilitate settlement. *See* Brown & Marriott, *supra* note 254, at 20. *Implementing the ADR Act*, *supra* note 411, at 30-31 suggests factors to be considered in determining the appropriate form of ADR.

[461] For an example of this type of use of ADR, see Peter David Blanck, *On Integrating Persons with Mental Retardation: The ADA and ADR*, 22 N.M. L.REV. 260 (1992) (illustrating the use of ADR in settlement of a class action against the state of Wyoming by a class of plaintiffs with mental retardation seeking improvement of conditions at the state training school and establishment of a framework for integration into the community).

INDEXED BIBLIOGRAPHY

1968-1995

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A BIBLIOGRAPHY

1968-1995

This bibliography is a list of reports, articles, and papers wholly or partially funded or sponsored by the Administrative Conference, or written by ACUS staff members. Many reports were written by a consultant performing research for the Conference in the process of developing recommendations. In addition, there are guides, sourcebooks, and manuals prepared by the staff of the Office of the Chairman, journal articles written by the staff, published transcripts of colloquia, seminars and other meetings, and papers prepared by committees or working groups. Many reports are also reprinted privately, so titles vary. Entries for reports that lead to a recommendation contain an annotation with additional bibliographic information about the recommendation. The titles used for this bibliography are the titles that appear in the series, *Recommendations and Reports*. All published versions are noted in each entry.

Recommendations themselves can be found in the *Federal Register*, *the Annual Report of the Administrative Conference* for the year of adoption, and in the *Code of Federal Regulations* through 1993. Due to budgetary constraints only the titles, not the text, of recommendations were printed in the CFR in 1994 and 1995. The first 35 recommendations were originally sequentially numbered. In 1973, recommendations began to be numbered by calendar year, then sequentially, *e.g.*, 73-1, and the original recommendations were re-numbered accordingly. Though they should be cited in the renumbered format, both versions are given here for clarity. A complete listing of all recommendations and statements, with citations, will be published in the *Federal Register* in late October 1995.

Transcripts of meetings are listed separately, by date, at the end of the bibliography. Subject and author indexes are also included at the end. With the closing of the Administrative Conference on October 31, 1995, all of the items in this bibliography, Research Program files, and copies of plenary transcripts have been donated to the Law Library, Washington College of Law, American University, 4400 Massachusetts Ave., NW, Washington, DC.

1. **Ablard, Charles D.** Some comparisons between the Council on Tribunals and the Administrative Conference of the U.S. 24 AM. J. COMP. L. 73 (1976).

2. **Ablard, Charles D.** The structure of tribunals and the appointment of their members in Great Britain. 2 HASTINGS INT'L & COMP. L. REV. 333 (1979).

3. **Adams, Arvil V., and Jose R. Figueroa.** Expediting settlement of employee grievances in the Federal sector: an evaluation of the MSPB's appeals arbitration procedure. Washington, D.C.: U.S. Gov't Prt. Off., 1985.

4. **Administrative Conference of the U.S. (Office of the Chairman).** Administrative Conference report on ABA proposals to amend the Administrative Procedure Act, May 24, 1973. 25 ADMIN. L. REV. 425 (1973)

5. **Administrative Conference of the U.S. (Office of the Chairman).** Agency arbitration: constitutional and statutory issues. Studies in administrative law and procedure, 88-1. Washington, D.C.: U.S. Gov't Prt. Off., 1988.

6. **Administrative Conference of the U.S. (Office of the Chairman).** Building consensus in agency rulemaking: implementing the negotiated rulemaking act, October 1995.

7. **Administrative Conference of the U.S. (Office of the Chairman).** Colloquium on regulatory design in theory and practice. Washington, D.C.: U.S. Gov't Prt. Off., 1983-1985. 3 vols. [Summaries of discussion at a series of meetings held from 1982-1985].

8. **Administrative Conference of the U.S. (Office of the Chairman).** Directory of administrative hearing facilities. 2d ed. Washington, D.C.: U.S. Gov't Prt. Off., 1984. [1st ed. published in 1981].

9. **Administrative Conference of the U.S. (Office of the Chairman).** Drafting Federal grant statutes. [Prepared] by Malcolm S. Mason. Studies in administrative law and procedure, 90-1. Washington, D.C.: U.S. Gov't Prt. Off., 1990.

10. **Administrative Conference of the U.S. (Office of the Chairman).** Federal administrative law judge hearings: statistical report. 1975 ed., Washington, D.C.: U.S. Gov't Prt. Off., 1977. 1976-1978 ed., Washington, D.C.: U.S. Gov't Prt. Off., 1980.

11. **Administrative Conference of the U.S. (Office of the Chairman).** Federal administrative procedure sourcebook: statutes and related materials. 2d ed. Washington, D.C.: U.S. Gov't Prt. Off., 1992. [1st ed. published in 1985].

12. **Administrative Conference of the U.S. (Office of the Chairman).** Federal agency use of ADR: a roundtable for general counsels. United State Courthouse, Washington, D.C., January 23, 1990. Washington, D.C.: ACUS.

13. **Administrative Conference of the U.S. (Office of the Chairman).** Federal user fees: proceedings of a symposium. Thomas D. Hopkins, ed. Washington, D.C.: U.S. Gov't Prt. Off., 1988. [Sponsored by ACUS held at the National Press Club, Washington, D.C., May 3, 1988].

14. **Administrative Conference of the U.S. (Office of the Chairman).** From conflict to cooperation: alternative dispute resolution. A presentation of ACUS in partnership with FMCS [Federal Mediation and Conciliation Service]. December 1993. Videotape.

15. **Administrative Conference of the U.S. (Office of the Chairman).** A guide to Federal agency rulemaking. 2d ed. Prepared by Benjamin W. Mintz and Nancy G. Miller. Washington, D.C.: U.S. Gov't Prt. Off., 1991. [1st ed., 1983].

16. **Administrative Conference of the U.S. (Office of the Chairman).** Implementing the ADR Act: guidance for agency dispute resolution specialists. Washington, D.C.: ACUS, February 1992.

17 **Administrative Conference of the U.S. (Office of the Chairman).** Increasing the effectiveness of offices of general counsel: recommendations to the National Performance Review. Prepared by an inter-agency task force chaired by ACUS. Letter report, October 17, 1995.

18. **Administrative Conference of the U.S. (Office of the Chairman).** Inspectors general: an institution in need of reform? Transcript, March 3, 1993. Washington, DC: U.S. Gov't Prt. Off., 1993. [ACUS colloquy series].

19. **Administrative Conference of the U.S. (Office of the Chairman).** An introduction to ADR and the Roster of Neutrals. Resource papers in administrative law. Washington, D.C.: U.S. Gov't Prt. Off., 1989.

20. **Administrative Conference of the U.S. (Office of the Chairman).** Legislative veto of agency rules after *INS v. Chadha:* Twenty-Seventh Plenary Session discussion on December 15, 1983. Washington, D.C.: U.S.

Gov't Prt. Off., 1984. *Partial contents:* App. B, Harold Levinson. Congressional oversight of agency rulemaking: options available after *Chadha.*

21. **Administrative Conference of the U.S. (Office of the Chairman).** Manual for administrative law judges. 3d ed., 1993. [Prepared by] Morell E. Mullins. Washington, D.C.: U.S. Gov't Prt. Off., 1994. [1st ed., 1974, prepared by Merritt Ruhlen; 2d rev. ed., 1982, prepared by Merritt Ruhlen].

22. **Administrative Conference of the U.S. (Office of the Chairman).** Mediation: a primer for Federal agencies. Prepared by Thomas R. Colosi and Christopher B. Colosi. Resource papers in administrative law. Washington, D.C.: U.S. Gov't Prt. Off., 1993. *Also published in Spanish as:* Mediación: cartilla para agencias gubernamentales. Documentos recursos en derecho administrativo. Washington, D.C.: U.S. Gov't Prt. Off., 1993.

23. **Administrative Conference of the U.S. (Office of the Chairman).** Model adjudication rules. Prepared by the Model Adjudication Rules Working Group. Michael P. Cox, Reporter. Washington, D.C.: ACUS, December 1993. *Also:* Cox, Michael P. The model adjudication rules (MARs). 11 COOLEY L. REV. 75 (1994).

24. **Administrative Conference of the U.S. (Office of the Chairman).** Model rules for implementation of the Equal Access to Justice Act in agency proceedings. 1 C.F.R. § 315.101, and reprinted at 5-31 *in:* Administrative law. 3d. Desk book. Bethesda, MD: Pike & Fischer.

25. **Administrative Conference of the U.S. (Office of the Chairman).** Multi-member independent regulatory agencies: a preliminary survey of their organization. Rev. ed. Washington, D.C.: U.S. Gov't Prt. Off., 1992. [Originally published 1989].

26. **Administrative Conference of the U.S. (Office of the Chairman).** Negotiated rulemaking sourcebook. Prepared by David M. Pritzker and Deborah S. Dalton. Updated ed. Washington, D.C.: U.S. Gov't Prt. Off., 1995. [First ed. published in 1990].

27. **Administrative Conference of the U.S. (Office of the Chairman).** The ombudsman: a primer for Federal agencies. Prepared by David R. Anderson and Larry B. Hill. Resource papers in administrative law. Washington, D.C.: U.S. Gov't Prt. Off., 1991.

28. **Administrative Conference of the U.S. (Office of the Chairman).** Sourcebook: Federal agency use of alternative means of dispute resolution.

Prepared by Marguerite S. Millhauser and Charles Pou, Jr. Washington, D.C.: U.S. Gov't Prt. Off., 1987.

29. **Administrative Conference of the U.S. (Office of the Chairman).** Sourcebook on government ethics for presidential appointees. Prepared with the support of the General Services Administration. Washington, D.C.: ACUS, December 1988. *Partial contents:* Robert N. Roberts. A guide to Federal ethics laws for presidential appointees. *Infra* no. 319; Proceedings of a working conference on ethics in government, March 1, 1988; G. Calvin Mackenzie. Presidential transitions and the Ethics in Government Act of 1978; Thomas D. Morgan. Revision of Federal financial disclosure requirements; Deanne C. Siemer. Enforcement of the Federal ethics laws as applied to executive branch personnel.

30. **Administrative Conference of the U.S. (Office of the Chairman).** Toward improved agency dispute resolution: implementing the ADR Act. Report of the Administrative Conference of the United States on agency implementation of the Administrative Dispute Resolution Act. February 1995. Washington, D.C.: ACUS, December 1995. 3 vols.

31. **Administrative Conference of the U.S. and Federal Mediation and Conciliation Service.** Mediation of equal employment opportunity disputes at the Federal Aviation Administration: pilot program design. Prepared for the Department of Transportation and the Federal Aviation Administration. Unpublished paper, July 28, 1994.

32. **ACUS Dispute Systems Design Working Group.** Dispute systems design handbook. Unpublished paper, February 25, 1994. *Contents:* Dispute systems design pre-design organization checklist. June 1993; Operational aspects of designing dispute resolution systems. February 1994; Performance indicators for ADR program evaluation. November 1993.

33. **ACUS Dispute Systems Design Working Group.** Evaluating ADR programs: a handbook for Federal agencies. Unpublished paper, March 1995.

34. **ACUS Special Committee on the Future of ACUS.** Report of the Special Committee on the Future of ACUS. Washington, DC: ACUS, 1992.

35. **ACUS Special Committee to Review the Government in the Sunshine Act.** Reform of the Government in the Sunshine Act. Unpublished report, October 10, 1995. [Includes transcript of public hearing held September 12, 1995].

36. **Aman, Alfred C., Jr.** Implementing the Bank Holding Company Act: the adjudicatory procedures and informal bargaining processes of the Federal Reserve Board. 1988 ACUS 189. *Also:* Bargaining for justice: an examination of the use and limits of conditions by the Federal Reserve Board. 74 IOWA L. REV. 837 (1989).

    Recommendation 88-3: "The Federal Reserve Board's Handling of Applications Under the Bank Holding Company Act." 1 C.F.R. § 305.88-3 (1993), and 53 FED. REG. 26,068 (July 11, 1988)

37. **Aman, Alfred C., Jr.** Institutionalizing the energy crisis: some structural and procedural lessons. 1980 ACUS 205, and 65 CORNELL L. REV. 491 (1980).

    Recommendation 80-2: "Enforcement of Petroleum Price Regulations." 1 C.F.R. § 305.80-2 (1982), and 45 FED. REG. 46,774 (July 11, 1980).

38. **ABA Committee on Government Standards.** Keeping faith: government ethics and government ethics regulation. Cynthia Farina, Reporter. 45 ADMIN. L. REV. 287 (1993).

39. **ABA Section of Administrative Law and Regulatory Practice.** The Administrative Conference of the U.S.: where do we go from here? 8 COOLEY L. REV. 147 (1991). [Dialogue at the 1990 annual meeting of the ABA. Participants include: Paul R. Verkuil, Victor G. Rosenblum, Geoffrey P. Miller, Phillip D. Brady, and Marshall J. Breger.].

40. **Anderson, David R., and Diane M. Stockton.** Ombudsmen in Federal agencies: the theory and the practice. 1990 ACUS 105. *Also:* Federal ombudsmen: an underused resource. 5 ADMIN. L.J. AM. U. 275 (1991).

    Recommendation 90-2: "The Ombudsman in Federal Agencies." 1 C.F.R. § 305.90-2 (1993), and 55 FED. REG. 34,211 (Aug. 22, 1990)

41. **Anderson, Frederick R.** Negotiation and informal agency action: the case of Superfund. 1984 ACUS 263, and 1985 DUKE L.J. 261.

    Recommendation 84-4: "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA." 49 FED. REG. 29,942 (July 25, 1984), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992). [This recommendation was substantially implemented by EPA memorandum and by the Superfund Amendments and Reauthorization Act of 1986].

42. **Anthony, Robert A.** Interpretive rules, policy statements, guidances, manuals and the like: Should agencies use them to bind the public? 1992 ACUS 73, and 41 DUKE L.J. 1311 (1992). *Also:* "Interpretive" rules, "legislative" rules and "spurious rules: lifting the smog. 8 ADMIN. L.J. AM. U. 1 (1994).

    Recommendation 92-2: "Agency Policy Statements." 1 C.F.R. § 305.92-2 (1993), and 57 FED. REG. 30,103 (July 8, 1992).

43. **Anthony, Robert A.** Towards simplicity and rationality in comparative broadcast licensing proceedings. 24 STAN. L. REV. 1 (1971).

44. **Anthony, Robert A.** Which agency interpretations should bind citizens and the courts? 1989 ACUS 369, and 7 YALE J. ON REG. 1 (1990). *Also:* Which agency interpretations should get judicial deference?: A preliminary inquiry. 40 ADMIN. L. REV. 121 (1988).

    RECOMMENDATION 89-5: "Achieving Judicial Acceptance of Agency Statutory Interpretations." 1 C.F.R. § 305.89-5, and 54 FED. REG. 28972 (JULY 10, 1989).

45. **Anthony, Robert A., and James E. Byrne.** International Trade Commission release of confidential information under protective orders in antidumping and countervailing duty proceedings. 1984 ACUS 573. *Also:* Safeguarding confidential information in I.T.C. injury proceedings: proposals to reduce the risks of disclosure. 17 LAW & POL'Y INT'L BUS. 1 (1985).

    Recommendation 84-6: "Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings." 1 C.F.R. § 305.84-6 (1991), and 49 FED. REG. 49,838 (Dec. 24, 1984), as amended at 54 FED. REG. 61,769 (Dec. 29, 1992).

46. **Aronowitz, Dennis S.** Report of the Committee on Claims Adjudication in support of Recommendation no. 22. 1 ACUS 665 (1971).

    Recommendation 70-5 [Originally Recommendation no. 22]: "Practices and Procedures under the Renegotiation Act of 1951." 1 ACUS 43 (1971), and 1970-71 ACUS ANN. REP. 49. [The Renegotiation Act has expired. See PUB. L. 94-431, 92 STAT. 1043.]

47. **Asimow, Michael.** Advice to the public from Federal administrative agencies. New York: Matthew Bender, 1973.

48. **Asimow, Michael.** Civil penalties for inaccurate and delinquent tax returns. 23 UCLA L. REV. 637 (1976). *Also:* "Civil penalties," at 619 *in:* Davenport, Charles. Administrative procedures of the Internal Revenue Service. *Infra* no. 132.

    Recommendation 75-7: "Internal Revenue Service Procedures: Civil Penalties." 41 FED. REG. 3,984 (Jan. 27, 1976).

49. **Asimow, Michael.** Interim-final rules. 1994-1995 ACUS 477.

    Recommendation 95-4. "Procedures for Noncontroversial and Expedited Rulemaking." 60 FED. REG. 43,110 (Aug. 18, 1995).

50. **Asimow, Michael.** Public participation in the adoption of interpretive rules and policy statements. 4 ACUS 615 (1979), and 75 MICH. L. REV. 520 (1977).

Recommendation 76-5: "Interpretive Rules of General Applicability and Statements of General Policy." 1 C.F.R. § 305.76-5 (1993), and 41 FED. REG. 56,769 (Dec. 30, 1976).

51. **Asimow, Michael.** When the curtain falls: separation of functions in Federal administrative agencies. 1981 ACUS 141, and 81 COLUM. L. REV. 759 (1981).

52. **Baram, Michael S.** Regulation of health, safety and environmental quality and the use of cost-benefit analysis. 1979 ACUS 377. *Also:* Cost-benefit analysis: an inadequate basis for health, safety, and environmental regulatory decisionmaking. 8 ECOLOGY L.Q. 473 (1980).

Recommendation 79-4: "Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation." 1 C.F.R. § 305.79-4 (1993), and 44 FED. REG. 38,826 (July 3, 1979) and 44 FED. REG. 47,759 (Aug. 15, 1979).

53. **Baram, Michael S.** Risk communication by regulatory agencies in protecting health, safety, and the environment. 1990 ACUS 207.

Recommendation 90-3: "Use of Risk Communication by Regulatory Agencies in Protecting Health, Safety, and the Environment." 1 C.F.R. § 305.90-3 (1993), and 55 FED. REG. 34,212 (Aug. 22, 1990).

54. **Baxter, Lawrence G.** Life in the administrative track: administrative adjudication of claims against savings institution receiverships. 1988 ACUS 409, and 1988 DUKE L.J. 422.

Recommendation 88-8: "Resolution of Claims Against Savings Receiverships." 1 C.F.R. § 305.88-8, and 53 FED. REG. 39,587 (Oct. 11, 1988), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992). [The issues addressed in this recommendation were resolved by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, PUB. L. 101-73, 101 STAT. 183].

55. **Baxter, Lawrence G.** Review of PCA decisions. 1993 ACUS 109. *Also:* Administrative and judicial review of prompt corrective action decisions by the Federal banking regulators. 7 ADMIN. L.J. AM. U. 505 (1994).

Recommendation 93-2: "Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators." 58 FED. REG. 45,410 (Aug. 30, 1993).

56. **Bednar, Richard J.** Government contracting officers should make greater use of ADR techniques in resolving contract disputes. 1989 ACUS 149.

Recommendation 89-2: "Contracting Officers' Management of Disputes." 1 C.F.R. § 305.89-2 (1993), and 54 FED. REG. 28,967 (July 10, 1989).

57. **Bennett, Robert W.** Broadcast coverage of administrative proceedings. 2 ACUS 625 (1973), and 67 NW. U. L. REV. 528 (1972).

Recommendation 72-1: "Broadcast of Agency Proceedings." 1 C.F.R. § 305.72-1.

58. **Berg, Richard K.** Administrative Conference of the United States: report on the Seventh Plenary Session. 25 ADMIN. L. REV. 61 (1973). [Held June 8-9, 1972].

59. **Berg, Richard K.** Conflict of interest for members of Federal advisory committees. 1989 ACUS 205, and 37 FED. BAR NEWS & J. 392 (1990).

    Recommendation 89-3: "Conflict of Interest Requirements for Federal Advisory Committees." 1 C.F.R. § 305.89-10 (1993), and 54 FED. REG. 28,969 (July 10, 1989).

60. **Berg, Richard K.** Insulation of decision-making at the Department of Transportation. At Vol. 2, 111, *in:* U.S. Department of Transportation. CAB sunset seminar: future administration of the international aviation functions of the CAB. Washington, D.C.: U.S. Gov't Prt. Off., 1983.

61. **Berg, Richard K.** Legal and structural obstacles to the use of alternative dispute resolution for claims for and against the Federal government. January 1988. *In:* Administrative Conference of the U.S. (Office of the Chairman). Agency arbitration. *Supra* no. 5.

62. **Berg, Richard K.** Re-examining policy procedures: the choice between rulemaking and adjudication. 38 ADMIN. L. REV. 149 (1986).

63. **Berg, Richard K.** Subpena powers in formal agency proceedings: explanatory memorandum in support of Recommendation 74-1. 3 ACUS 408 (1975).

    Recommendation 74-1: "Subpena Powers in Formal Agency Proceedings." 1 C.F.R. § 305.74-1 (1993), and 39 FED. REG. 23,041 (June 26, 1974).

64. **Berg, Richard K., and Stephen H. Klitzman.** An interpretive guide to the Government in the Sunshine Act. Washington, D.C.: U.S. Gov't Prt. Off., 1978. *Reprinted:* Appendix 7G *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender.

65. **Bermann, George A.** Administrative handling of monetary claims: tort claims at the agency level. 1984 ACUS 639. *Revision:* Federal tort claims at the agency level: the FTCA administrative process. 35 CASE W. RES. L. REV. 509 (1984-85).

    Recommendation 84-7: "Administrative Settlement of Tort and Other Monetary Claims Against the Government." 1 C.F.R. § 305.84-7 (1993), and 49 FED. REG. 49,840 (Dec. 24, 1984).

66. **Bermann, George A.** Regulatory cooperation with counterpart agencies abroad: the FAA's aircraft certification experience. 1991 ACUS 63, and 24 LAW & POL'Y INT'L BUS. 669 (1993).

    Recommendation 91-1: "Federal Agency Cooperation with Foreign Government Regulators." 1 C.F.R. § 305.91-1 (1993), and 56 FED. REG. 33,842 (July 24, 1991).

67. **Bermann, George A.** Regulatory cooperation between the European Commission and U.S. administrative agencies. Unpublished report, October 1995.

68. **Bernard, Phyllis E.** Adjudicating Medicare hospital payment disputes: Isn't there a better way? Unpublished draft report, September 14, 1995.

69. **Beytagh, Francis X., Jr.** Judicial review in selective service cases: lessons from Vietnam. 2 ACUS 965 (1973), and 48 NOTRE DAME LAW. 1164 (1973).

Recommendation 72-7: "Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters." 2 ACUS 70 (1973), and 1972-73 ACUS ANN. REP. 36.

70. **Bloch, Frank S.** Report and recommendations on the Social Security Administration's appeals process. 1990 ACUS 307.

Recommendation 90-4: "Social Security Disability Program Appeals Process: Supplementary Recommendation." 1 C.F.R. § 305.90-4 (1993), and 55 FED. REG. 34,213 (Aug. 22, 1990).

71. **Bloch, Frank S.** The use of medical personnel in Social Security disability determinations. *Published as:* Disability determination: the administrative process and the role of medical personnel. Studies in social welfare policies and programs, no. 13. Westport, CT: Greenwood Pr., 1992.

Recommendation 89-10: "Improved Use of Medical Personnel in Social Security Disability Determinations." 1 C.F.R. § 305.89-10, and 54 FED. REG. 53,496 (Dec. 29, 1989), as amended at 55 FED. REG. 16,651 (Jan. 18, 1990).

72. **Bonfield, Arthur E.** "Military and foreign affairs function" rulemaking under the APA. 3 ACUS 226 (1975), and 71 MICH. L. REV. 221 (1972).

Recommendation 73-5: "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements." 1 C.F.R. § 305.73-5 (1993), and 39 FED. REG. 4,847 (Feb. 7, 1974).

73. **Bonfield, Arthur E.** Report of the Committee on Rulemaking in support of Recommendation no. 16. 1 ACUS 306 (1971). *Also:* Public participation in Federal rulemaking relating to public property, loans, grants, benefits, or contracts. 118 U. PA. L. REV. 540 (1970).

Recommendation 69-8 [Originally Recommendation no. 16]: "Elimination of Certain Exemptions From the APA Rulemaking Requirements." 1 C.F.R. § 305.69-8.

74. **Bonfield, Arthur E.** Representation for the poor in Federal rulemaking. 1 ACUS 79 (1971), and 67 MICH. L. REV. 511 (1969).

Recommendation 68-5: "Representation of the Poor in Agency Rulemaking of Direct Consequence to Them." 1 C.F.R. § 305.68-5 (1993).

75. **Bonfield, Arthur E.** Some tentative thoughts on public participation in the making of interpretive rules and general statements on policy under the APA 23 ADMIN. L. REV. 101 (1971).

76. **Bonine, John E.** Public-interest fee waivers under the Freedom of Information Act. 1981 ACUS 17, and 1981 DUKE L.J. 213.

Recommendation 81-1: "Procedures for Assessing and Collecting Freedom of Information Act Fees." 1 C.F.R. § 305.81-1 (1988), and FED. REG. 62,805 (Dec. 29, 1981), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989). [This recommendation has been largely implemented by PUB. L. 99-570 § 1801, 100 STAT. 3207-48, "Freedom of Information Reform Act of 1986"].

77. **Botein, Michael.** Primary jurisdiction: the need for better court/agency interaction. 29 RUTGERS L. REV. 867 (1976).

78. **Bowers, Michael W.** The expansion of user fees to finance government programs: an area to watch. 34 FED. BAR NEWS & J. 21 (1987).

79. **Bowers, Michael W.** A review of the development of law on informal rulemaking procedure: report to the Committee on Rulemaking. 1982. [Unpublished].

Statement 7: "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act." 1 C.F.R. § 310.7. 47 FED. REG. 30,715 (July 15, 1982)

80. **Boyer, Barry B.** Alternatives to administrative trial-type hearings for resolving complex scientific, economic, and social issues. 71 MICH. L. REV. 111 (1972).

81. **Boyer, Barry B.** Funding public participants in administrative rulemaking: the Federal Trade Commission experience. 1979 ACUS 437, and 70 GEO. L.J. 51 (1981).

Recommendation 79-5: "Hybrid Rulemaking Procedures of the Federal Trade Commission: Administration of the Program to Reimburse Participants' Expenses." 1 C.F.R. § 305.79-5 (1988), and 44 FED. REG. 38,817 (July 3, 1979).

82. **Boyer, Barry B.** Phase II report on the trade regulation rulemaking procedures of the Federal Trade Commission. 1980 ACUS 33. *Also:* Compensating public participants in administrative rulemaking: the Federal Trade Commission experience (Part 2). 1980 ACUS 165. *Also:* Funding public participation in agency proceedings: the Federal Trade Commission experience. 70 GEO. L.J. 51 (1981).

Recommendation 80-1: "Trade Regulation Rulemaking Under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act." 1 C.F.R. § 305.80-1 (1988), and 45 FED. REG. 46,771 (July 11, 1980).

83. **Boyer, Barry B.** A report to the Administrative Conference of the U.S. by the Special Project for the Study of Rulemaking Procedures under the Magnuson-Moss Warranty: Federal Trade Commission Act. May 1979. *Published as:* Executive summary. 1979 ACUS 41. *Also:* Cartwright, Bliss C. and Barry B. Boyer. Mobilizing Friends and foes in administrative proceedings. 6 LAW & POL'Y 451 (1984).

    Recommendation 79-1: "Hybrid Rulemaking Procedures of the Federal Trade Commission." 1 C.F.R. § 305.79-1 (1988), and 44 FED. REG. 38,817 (July 3, 1979), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

84. **Boyer, Barry B., and Errol Meidinger.** Privatizing regulatory enforcement: a preliminary assessment of citizen suits under Federal environmental laws. 1985 ACUS 365, and 34 BUFFALO L. REV. 833 (1986).

    Recommendation 85-3: "Coordination of Public and Private Enforcement of Environmental Laws." 1 C.F.R. § 305.85-3 (1993), and 50 FED. REG. 28,366 (July 12, 1985).

85. **Breger, Marshall J.** The Administrative Conference of the United States: a quarter century perspective. 53 U. PITT. L. REV. 813 (1992).

86. **Breger, Marshall J.** The Administrative Procedure Act after forty years. 33 FED. BAR NEWS & J. 297 (1986).

87. **Breger, Marshall J.** The APA: an Administrative Conference perspective. 72 VA. L. REV. 337 (1986).

88. **Breger, Marshall J.** Amendments to procedure act encourage agencies to use ADR. 13 NAT'L L.J., Mar. 4, 1991, at 22.

89. **Breger, Marshall J.** Another view of administrative rulemaking in the 1990's. THE CHAMPION, November 1991, at 27.

90. **Breger, Marshall J.** Comments on Bernard Schwartz' essay. 5 ADMIN. L.J. AM. U. 347 (1991). [Schwartz, Bernard. Recent administrative law issues and trends. 3 ADMIN. L.J. AM. U. 543 (1990)].

91. **Breger, Marshall J.** Alternative dispute resolution: good for the government?: bad for the private bar? 6 ADMIN. L.J. AM. U. 53 (1992). [Comments at the Third Robert C. Byrd Conference on the Administrative Process, held June 21, 1991].

92. **Breger, Marshall J.** A conservative's comments on Edley and Sunstein. 1991 DUKE L.J. 671. [Articles published in the same issue: Edley, Christopher, Jr. The governance crisis, legal theory, and political ideology. 1991 DUKE L.J. 561. Sunstein, Cass R. Administrative substance. 1991 DUKE L.J. 607].

93. **Breger, Marshall J.** Defining administrative law. 60 GEO. WASH. L. REV. 269 (1991). [Reviewing: Strauss, Peter L. An introduction to administrative justice in the United States. Durham, N.C.: Carolina Academic Pr., 1989].

94. **Breger, Marshall J.** Lawyers must lead the way. NAT'L L.J., Nov. 18, 1991, at 15.

95. **Breger, Marshall J.** Pro bono representation and the government lawyer. 6 WASH. LAW., November/December 1991, at 19.

96. **Breger, Marshall J.** "Races to courthouse" exasperate judges, waste litigants' time. 10 LEGAL TIMES, July 20, 1987, at 17.

97. **Breger, Marshall J.** Realizing the potential of arbitration in Federal agency dispute resolution. 43 ARBITRATION J., June 1991, at 35.

98. **Breger, Marshall J.** Thoughts on accountability and the administrative process. 39 ADMIN. L. REV. 399 (1987).

99. **Broderick, Albert.** Justice in the books or justice in action: an institutional approach to involuntary hospitalization for mental illness. 20 CATH. U. L. REV. 547 (1971).

100. **Bruff, Harold H.** The constitutionality of arbitration in Federal programs. 1987 ACUS 533, and reprinted at Appendix 33C *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. *Also:* Public programs private deciders: the constitutionality of arbitration in Federal programs. 67 TEX. L. REV. 441 (1989), and reprinted at 7 *in:* Administrative Conference of the U.S. (Office of the Chairman). Agency arbitration: constitutional and statutory issues. Studies in administrative law and procedure, 88-1. Washington, D.C.: U.S. Gov't Prt. Off., 1988.

     Recommendation 87-5: "Arbitration in Federal Programs." 1 C.F.R. § 305.87-5 (1993), and 52 FED. REG. 23,635 (June 24, 1987).

101. **Bruff, Harold H.** Presidential exemption from mandatory retirement of members of the independent regulatory commissions. 4 ACUS 395 (1979), and 1976 DUKE L.J. 249.

     Recommendation 76-1: "Exception From Mandatory Retirement for Certain Presidential Appointees." 1 C.F.R. § 305.76-1, and 41 FED. REG. 29,653 (July 19, 1976), and 41 FED. REG. 30,319 (July 23, 1976). [Note: This recommendation has become moot as a result of Sec. 5, PUB. L. 95-256].

102. **Bruff, Harold H.** Presidential management of agency rulemaking. 1988 ACUS 527, and 57 GEO. WASH. L. REV. 533 (1989).

Recommendation 88-9: "Presidential Review of Agency Rulemaking." 1 C.F.R. § 305.88-9 (1993), and 54 FED. REG. 5,207 (Feb. 2, 1989).

103. **Bruff, Harold H.** Specialized courts in administrative law. 1991 ACUS 863, and 43 ADMIN. L. REV. 329 (1991).

Recommendation 91-9: "Specialized Review of Administrative Action." 1 C.F.R. § 305.91-9 (1993), and 56 FED. REG. 67,143 (Dec. 30, 1991).

104. **Cappalli, Richard B.** Model for case management: the Grant Appeals Board. 1986 ACUS 663.

Recommendation 86-7: "Case Management as a Tool for Improving Agency Adjudication." 1 C.F.R. § 305.86-7 (1993), and 51 FED. REG. 46,989 (Dec. 30, 1986).

105. **Cardozo, Michael H.** Federal Advisory Committee Act in operation. 1980 ACUS 313, and 33 ADMIN. L. REV. 1 (1981).

Recommendation 80-3: "Interpretation and Implementation of the Federal Advisory Committee Act." 1 C.F.R. § 305.80-3 (1993), and 45 FED. REG. 46,775 (July 11, 1980).

106. **Carrow, Milton M., and J. D. Nyhart,** eds. Law and science in collaboration. Lexington, MA: D.C. Heath, 1983.

107. **Cass, Ronald A.** Agency review of administrative law judges' decisions. 1983 ACUS 115. *Also:* Allocation of authority within bureaucracies: empirical evidence and normative analysis. 66 B.U. L. REV. 1 (1986).

Recommendation 83-3: "Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act." 1 C.F.R. § 305.83-3 (1993), and 48 FED. REG. 57,461 (Dec. 30, 1983).

108. **Cass, Ronald A.** The discretionary function exception to the Federal Tort Claims Act. 1987 ACUS 1503.

109. **Chambers, Reid P.** Conflicts of interest in the administration of Federal trust responsibility. 2 ACUS 659 (1973).

Recommendation 72-2: "Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes." 2 ACUS 57 (1973), and 1971-72 ACUS ANN. REP. 79

110. **Chambers, Reid P., and Monroe E. Price.** Regulating sovereignty: secretarial discretion and the leasing of Indian lands. 26 STAN. L. REV. 1061 (1974).

111. **Clagett, Brice McAdoo.** Informal action, adjudication, rule making: some recent developments in Federal administrative law. 2 ACUS 175 (1973), and 1971 DUKE L.J. 51.

Recommendation 71-3 [Originally Recommendation no. 25]: "Articulation of Agency Policies." 1 C.F.R. § 305.71-3.

112. **Council of Independent Regulatory Agencies.** Regulatory relief at the independent regulatory agencies. Washington, D.C.: ACUS, November 1982.

113. **Cox, Michael P.** The feasibility and practicability of establishing a center of state administrative law. 39 ADMIN. L. REV. 205 (1987).

114. **Cox, Michael P.** Regulation of attorneys practicing before Federal agencies. 1982 ACUS 491 (Vol. 2), and 34 CASE W. RES. L. REV. 173 (1984).

Statement 8: "Statement of the Administrative Conference on Discipline of Attorneys Practicing Before Federal Agencies." 1 C.F.R. § 310.8 (1993), and 47 FED. REG. 58,210 (Dec. 30, 1982).

115. **Cramton, Roger C.** Causes and cures of administrative delay. 58 A.B.A. J. 937 (1972).

116. **Cramton, Roger C.** A comment on trial-type hearings in nuclear power plant siting. 58 VA. L. REV. 585 (1972).

117. **Cramton, Roger C.** A Federal ombudsman. 1972 DUKE L.J. 1.

118. **Cramton, Roger C.** Elimination of jurisdictional amount requirement in judicial review. Report of the Committee on Judicial Review in support of Recommendation no. 7. 1 ACUS 170 (1971). *Revision:* Nonstatutory review of Federal administrative action: the need for statutory reform of sovereign immunity, subject matter jurisdiction, and parties defendant. 68 MICH. L. REV. 387 (1970), at 436.

Recommendation 68-7 [Originally numbered Recommendation no. 7]: "Elimination of Jurisdictional Amount Requirement in Judicial Review." 1 ACUS 22 (1971), and 1969 ACUS ANN. REP. 39. [Note: This recommendation has been implemented by PUB. L. 94-574].

119. **Cramton, Roger C.** The need for reform of the law of parties defendant in nonstatutory review of Federal administrative action. Report of the Committee on Judicial Review in support of Recommendation no. 18. 1 ACUS 417 (1971). *Revision:* Nonstatutory review of Federal administrative action: the need for statutory reform of sovereign immunity, subject matter jurisdiction, and parties defendant. 68 MICH. L. REV. 387 (1970), at 449.

Recommendation 70-1 [Originally Recommendation no. 18]: "Parties Defendant." 1 ACUS 32 (1971). [Note: This recommendation has been implemented by PUB. L. 94-574].

120. **Cramton, Roger C.** Statutory reform of the sovereign immunity doctrine. Report of the Committee on Judicial Review in support of Recommendation no. 9. 1 ACUS 191 (1971). *Revision:* Nonstatutory review of Federal administrative action: the need for statutory reform of sovereign immunity,

subject matter jurisdiction, and parties defendant. 68 MICH. L. REV. 387 (1970), at 396.

Recommendation 69-1 [Originally Recommendation no. 9]: "Statutory Reform of the Sovereign Immunity Doctrine." 1 ACUS 23 (1971). [Note: This recommendation has been implemented by PUB. L. 94-574].

121. **Cramton, Roger C.** A title change for Federal hearing examiners? "A rose by any other name..." 40 GEO. WASH. L. REV. 918 (1972).

122. **Cramton, Roger C.** The why, where, and how of broadened public participation in the administrative process. 2 ACUS 422 (1973), and 60 GEO. L.J. 525 (1972).

Recommendation 71-6: "Public Participation in Administrative Hearings." 1 C.F.R. § 305.71-6 (1993).

123. **Cramton, Roger C., and Richard K. Berg.** Enforcing the National Environmental Policy Act in Federal agencies. 18 PRAC. LAW., May 1972, at 72.

124. **Cramton, Roger C., and Richard K. Berg.** On leading a horse to water: NEPA and the Federal bureaucracy. 71 MICH. L. REV. 511 (1973).

125. **Cramton, Roger C., and Barry B. Boyer.** Citizens suits in the environmental field: peril or promise? 25 ADMIN. L. REV. 147 (1972), and 2 ECOLOGY L.Q. 407 (1972).

126. **Croley, Steven P**. Practical guidance on the applicability of the Federal Advisory Committee Act: a report for the Department of Labor. Unpublished report, September 1995.

127. **Croley, Steven P. and William F. Funk.** The Federal Advisory Committee Act and good government. Unpublished draft report, September 15, 1995.

128. **Crowell, Eldon H., and Charles Pou, Jr.** Appealing government contract decisions: reducing the cost and delay of procurement litigation. 1987 ACUS 1139, and 49 MD. L. REV. 183 (1990).

Recommendation 87-11: "Alternatives for Resolving Government Contract Disputes." 1 C.F.R. § 305.87-11 (1993), and 52 FED. REG. 49,148 (Dec. 30, 1987).

129. **Currie, David P.** Judicial review under the Clean Air Act and Federal Water Pollution Control Act. 4 ACUS 555 (1979). *Also:* Judicial review under Federal pollution laws. 62 IOWA L. REV. 1221 (1977).

Recommendation 76-4: "Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act." 1 C.F.R. § 305.76-4 (1988), and 41 FED. REG. 56,767 (Dec. 30, 1976), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

130. **Currie, David P., and Frank I. Goodman.** Judicial review of Federal administrative action: quest for the optimum forum. 4 ACUS 197 (1979), and 75 Colum. L. Rev. 1 (1975).

Recommendation 75-3: "The Choice of Forum for Judicial Review of Administrative Action." 1 C.F.R. § 305.75-3 (1993), and 40 Fed. Reg. 27,926 (July 2, 1975).

131. **Daniel, Johnnie.** Assessment of the mediation program of the U.S. District Court for the District of Columbia. Unpublished report, April 1995.

132. **Davenport, Charles.** Administrative procedures of the Internal Revenue Service. 94th Cong., 2d Sess. S. Doc. 94-266. Washington, D.C.: U.S. Gov't Prt. Off., 1975. *Also:* Summary of report in support of Recommendations 75-5 - 75-10: administrative procedures of the Internal Revenue Service. 4 ACUS 317 (1979). *Also:* Summary and recommendations on administrative procedures of the Internal Revenue Service prepared for the Administrative Conference. At 272 [Appendix B] *in:* U.S. Congress. House. Comm. on Ways and Means. IRS taxpayer service program. Hearings before the... Subcomm. on Oversight. 95th Cong., 1st Sess. July 26 and 27, 1977. Serial no. 95-63. Washington, D.C.: U.S. Gov't Prt. Off., 1978.

Recommendation 75-5: "The Audit and Settlement Processes." 41 Fed. Reg. 3,982 (Jan. 27, 1976).

Recommendation 75-6: "Collection of Delinquent Taxes." 41 Fed. Reg. 3,982 (Jan. 27, 1976).

Recommendation 75-7: "Civil Penalties." 41 Fed. Reg. 3,984 (Jan. 27, 1976).

Recommendation 75-8: "Tax Return Confidentiality." 41 Fed. Reg. 3985 (Jan. 27, 1976) as amended at 41 Fed. Reg. 29655 (July 19, 1976).

Recommendation 75-9: "Taxpayer Services and Complaints." 41 Fed. Reg. 3986 (Jan. 27, 1976).

Recommendation 75-10: "The IRS Summons Power." 41 Fed. Reg. 3987 (Jan. 27, 1976).

133. **Davis, Frederick.** Judicial review of rulemaking: new patterns and new problems. 1981 Duke L.J. 279.

134. **DeLong, James V.** Benzene exposes workers to unresolved issues. Legal Times, Sept. 8, 1980, at 40.

135. **DeLong, James V.** Informal rulemaking and the integration of law and policy. 65 Va. L. Rev. 257 (1979).

136. **DeLong, James V.** Models of regulation. 80 Mich. L. Rev. 885 (1982). [Reviewing: Wilson, James Q., ed. The politics of regulation. New York: Basic Books, 1980].

137. **DeLong, James V.** The role, if any, of economic analysis in antitrust litigation. 12 SW. U. L. REV. 298 (1981).

138. **Diver, Colin S.** Agency articulation of policy. 1983 ACUS 387. *Also:* The optimal precision of administrative rules. 93 YALE L.J. 65 (1983).

Statement 9: "Statement on Guidelines for Choosing the Appropriate Level of Agency Policy Articulation." 1 C.F.R. § 310.9 (1993), and 48 FED. REG. 31,181 (July 7, 1983).

139. **Diver, Colin S.** The assessment and mitigation of civil money penalties by Federal administrative agencies. 1979 ACUS 203. *Abridged:* 79 COLUM. L. REV. 1435 (1979).

Recommendation 79-3: "Agency Assessment and Mitigation of Civil Money Penalties." 1 C.F.R. § 305.79-3 (1993), and 44 FED. REG. 38,824 (July 3, 1979).

140. **Dixon, Robert G., Jr.** Social Security disability and mass justice: a problem in welfare adjudication. New York: Praeger, 1973.

141. **Dixon, Robert G., Jr.** The welfare state and mass justice: a warning from the Social Security disability program. 1972 DUKE L.J. 681.

142. **Edles, Gary.** The Administrative Conference: entering a third decade of practical scholarship. 41 ADMIN. L. REV. 399 (1989).

143. **Edles, Gary.** Has *Steelworkers* burst *Chevron's* bubble?: some practical implications of judicial deference. 10 REV. LITIG. 695 (1991).

144. **Edles, Gary.** In defense of a micro agency: a look at the Administrative Conference of the United States. THE PUBLIC LAWYER, Winter 1995, at 18.

145. **Edles, Gary, and Michael Bowers.** Are they more virtuous today? Focus on government ethics. 37 FED. BAR NEWS & J. 378 (1990).

146. **Ellis, Emory N., Jr.** Report in support of discretionary review of decisions of presiding officers. 1 ACUS 155 (1971).

Recommendation 68-6: "Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency." 1 C.F.R. § 305.68-6.

147. **Estreicher, Samuel, and Richard L. Revesz.** Nonacquiescence by Federal administrative agencies. 98 YALE L.J. 679 (1989).

148. **Fallon, Richard H., Jr.** Imposing civil money for violations of Federal aviation regulations: implementing a fair and effective system. 1990 ACUS 43. *Also:* Enforcing aviation safety regulations: a case for the split-enforcement model of agency adjudication. 4 ADMIN. L.J. AM. U. 389 (1991).

Recommendation 90-1: "Civil Money Penalties for Federal Aviation Violations." 1 C.F.R. § 305.90-1 (1993), and 55 FED. REG. 34,209 (Aug. 22, 1990).

149. **Farrell, Margaret G.** The Social Security Administration's representative payee program: problems in administrative paternalism. 1991 ACUS 263. *Also:* Administrative paternalism: Social Security's representative payment program and two models of justice. 14 CARDOZO L. REV. 283 (1992). *Also:* Doing unto others: a proposal for participatory justice in Social Security's representative payment program. 53 U. PITT. L. REV. 883 (1992).

Recommendation 91-3: "The Social Security Representative Payee Program." 1 C.F.R. § 305.91-3 (1993), and 56 FED. REG. 33,47 (July 24, 1991).

150. **Fenton, Howard N., III.** Decisionmaking by the Foreign-Trade Zones Board and judicial review of board determinations. 4 MINN. J. GLOBAL TRADE 223 (1995).

151. **Fenton, Howard N., III.** Recommendations for injecting needed openness and due process reforms into the U.S. export control procedures. 1991 ACUS 173. *Also:* Reforming the procedures of the Export Administration Act: a call for openness and administrative due process. 27 TEX. INT'L L.J. 1 (1992).

Recommendation 91-2: "Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings." 1 C.F.R. § 305.91-2 (1993), and 56 FED. REG. 33,44 (July 24, 1991).

152. **Fidell, Eugene R.** Federal protection of private sector health and safety whistleblowers. 1987 ACUS 219, and 2 ADMIN. L.J. AM. U. 1 (1988), and 134 CONG. REC. S1447 (Daily ed., Feb. 23, 1988).

Recommendation 87-2: "Federal Protection of Private Sector Health and Safety Whistleblowers," 1 C.F.R. § 305.87-2 (1993), and 52 FED. REG. 2363 (June 24, 1987).

153. **Freedman, James O.** Report of the Committee on Agency Organization and Procedure in support of intermediate appellate boards. 1 ACUS 125 (1971).

Recommendation 68-6: "Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency." 1 C.F.R. § 305.68-6.

154. **Freedman, James O.** Summary action by administrative agencies. 40 U. CHI. L. REV. 1 (1972).

155. **Frye, John H., III.** Survey of non-ALJ hearing programs in the Federal government. 44 ADMIN. L. REV. 261 (1992).

156. **Funk, William F.** Close enough for government work?: using informal procedures for imposing administrative penalties. 1993 ACUS 43, and 24 SETON HALL L. REV. 1 (1993).

Recommendation 93-1: "Use of APA Formal Procedures in Civil Money Penalty Proceedings." 58 FED. REG. 45,409 (Aug. 30, 1993).

157. **Funk, William F.** The Paperwork Reduction Act: paperwork reduction meets administrative law. 24 HARV. J. ON LEGIS. 1 (1987).

158. **Gardner, Warner W.** The Administrative Conference of the United States. 400 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 36 (March 1972).

159. **Gardner, Warner W.** The procedures by which informal action is taken. 24 ADMIN. L. REV. 155 (1972).

160. **Gellhorn, Ernest.** Adverse publicity by administrative agencies. 3 ACUS 67 (1975), and 86 HARV. L. REV. 1380 (1973).

Recommendation 73-1: "Adverse Agency Publicity." 1 C.F.R. § 305.73-1 (1993), and 38 FED. REG. 16,839 (June 27,1973).

161. **Gellhorn, Ernest.** Public participation in administrative proceedings. 2 ACUS 376 (1973), and 81 YALE L.J. 359 (1972).

Recommendation 71-6: "Public Participation in Administrative Hearings." 1 C.F.R. § 305.71-6.

162. **Gellhorn, Ernest, and Harold H. Bruff.** Congressional control of administrative regulation: a study of legislative vetoes. 4 ACUS 679 (1979), and 90 HARV. L. REV. 1369 (1977).

Recommendation 77-l: "Legislative Veto of Administrative Regulations." 1 C.F.R. § 305.77-1 (1988), and 42 FED. REG. 54,251 (Oct. 5, 1977), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989). [Note: This recommendation has become moot as a result of the U. S. Supreme Court decision, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983)].

163. **Gellhorn, Ernest, and Paul B. Larsen.** Interlocutory appeal procedures in administrative hearings. 2 ACUS 81 (1973), and 70 MICH. L. REV. 109 (1971).

Recommendation 71-1 [Originally Recommendation no. 23]: "Interlocutory Appeal Procedures." 1 C.F.R. § 305.71-1.

164. **Gellhorn, Ernest, and William F. Robinson, Jr.** Summary judgment in administrative adjudication : report of the Committee on Agency Organization and Procedure in support of Recommendation no. 20. 1 ACUS 545 (1971), and 84 HARV. L. REV. 612 (1971).

Recommendation 70-3 [Originally Recommendation no. 20]: "Summary Decision in Agency Adjudication." 1 C.F.R. § 305.70-3.

165. **Gerhart, Peter M.** Judicial review of Customs Service actions. 4 ACUS 751 (1979), and 9 LAW & POL'Y INT'L BUS. 1101 (1978).

Recommendation 77-2: "Judicial Review of Customs Service Actions." 42 FED. REG. 54,251 (Oct. 5, 1977).

166. **Giannella, Donald A.** Agency procedures implementing the Freedom of Information Act: a proposal for uniform regulations. 2 ACUS 119 (1973), and 23 ADMIN. L. REV. 217 (1971).

Recommendation 71-2 [Originally Recommendation no. 24]: "Principles and Guidelines for Implementation of the Freedom of Information Act." 2 ACUS 18 (1973), and 1970-71 ACUS ANN. REP. 51. [Note: This recommendation has been largely implemented by the Freedom of Information Act Amendments of 1974, PUB. L. 93-502, 88 STAT. 1561].

167. **Gifford, Daniel J.** Remission and mitigation of forfeitures in the Justice Department. 1 ACUS 697 (1971).

168. **Gilhooley, Margaret.** The availability of decisions and precedents in agency adjudications: the impact of Freedom of Information Act requirements. 1989 ACUS 545, and 3 ADMIN. L.J. AM. U. 53 (1989).

Recommendation 89-8: "Agency Practices and Procedures for `Indexing and Public Availability of Adjudicatory Decisions." 1 C.F.R. § 305.89-8 (1993), and 54 FED. REG. 53,495 (Dec. 29, 1989).

169. **Gilhooley, Margaret.** Standards and procedures for the discretionary distribution of Federal assistance. 3 ACUS 422 (1975).

Recommendation 74-2: "Procedures for Discretionary Distribution of Federal Assistance." 1 C.F.R. § 305.74-2. 3 ACUS 38 (1975), and 39 FED. REG. 23,041 (June 26, 1974). [Note: One separate statement was filed concerning this recommendation].

170. **Gillette, Clayton P., and Thomas D. Hopkins.** Federal agency valuations of human life. 1988 ACUS 367.

Recommendation 88-7: "Valuation of Human Life in Regulatory Decisionmaking." 1 C.F.R. § 305.88-7, and 53 FED. REG. 39,586 (Oct. 11, 1988).

171. **Gillette, Clayton P., and Thomas D. Hopkins.** Federal user fees. 1987 ACUS 451. *Also:* Federal user fees: a legal and economic analysis. 67 B.U. L. REV. 795 (1987).

Recommendation 87-4: "User Fees." 1 C.F.R. § 305.87-4 (1993), and 52 FED. REG. 23,634 (June 24, 1987).

172. **Goldschmid, Harvey J.** An evaluation of the present and potential use of civil money penalties as a sanction by Federal administrative agencies. 2 ACUS 896 (1973).

Recommendation 72-6: "Civil Money Penalties as a Sanction." 1 C.F.R. § 305.72-6 (1993).

173. **Grad, Frank P.** Contractual indemnification of government contractors. 1988 ACUS 103, and 4 ADMIN. L.J. AM. U. 433 (1991).

Recommendation 88-2: "Federal Government Indemnification of Government Contractors." 1 C.F.R. § 305.88-2 (1993), and 53 FED. REG. 26,027 (July 11, 1988), and 53 FED. REG. 39,588 (Oct. 11, 1988).

174. **Graham, Heather G.** New effort focuses on role of contracting officer in deciding disputes. 28 CONT. MGMT., August 1988, at 14.

175. **Grassley, Sen. Charles E., and Charles Pou, Jr.** Congress, the Executive Branch, and the dispute resolution process, 1 J. DISP. RESOL. 1 (1992).

176. **Griffin, Brian C., and Gary J. Edles.** An alternate look at the Administrative Conference's recommendations on the administrative judiciary. JUDGES J., Fall 1993, at 38.

177. **Grunewald, Mark H.** Administrative mechanisms for resolving Freedom of Information Act disputes. 1987 ACUS 1341, 40 ADMIN. L. REV. 1 (1988). *Also:* Portions reprinted at Appendix 7F *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. *Also:* At 231-446 *in:* U.S. Congress. House. Comm. on Government Operations. FOIA: alternative dispute resolution proposals. Hearings before a Subcomm. of the.... 100th Cong., 1st Sess. December 1 and 2, 1987. Washington, DC: U.S. Gov't Prt. Off., 1988.

Statement 12: "Statement on Resolution of Freedom of Information Act Disputes." 1 C.F.R. § 310.12 (1993), and 52 FED. REG. 23,636 (June 24, 1987). *Also: At Appendix 7E in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. *Also:* At 447-448 *in:* U.S. Congress. House. Comm. on Government Operations. FOIA: alternative dispute resolution proposals. Hearings before a Subcomm. of the .... 100th Cong., 1st Sess. December 1 and 2, 1987. Washington, DC: U.S. Gov't Prt. Off., 1988.

178. **Grunewald, Mark H.** The Freedom of Information Act and confidentiality under the Administrative Dispute Resolution Act. 1994-1995 ACUS 557.

Recommendation 95-6, "ADR Confidentiality and the Freedom of Information Act." 60 FED. REG. 43115 (Aug. 18, 1995).

179. **Grunewald, Mark H.** The Labor Board's first rulemaking: an experience in pragmatism. 1991 ACUS 529. *Also:* The NLRB's first rulemaking: an exercise in pragmatism. 1991 DUKE L.J. 274.

Recommendation 91-5: "Facilitating the Use of Rulemaking by the National Labor Relations Board." 1 C.F.R. § 305.91-5 (1993), and 56 FED. REG. 33,851 (July 24, 1991).

180. **Grunschlag, Dov M.** Administering Federal programs of production adjustment. 49 AGRIC. HIST. 131 (1975).

181. **Halloran, Norbert A.** Federal agency hearings: a proposed caseload accounting system. Washington, D.C.: ACUS, 1974.

182. **Hamilton, Robert W.** Procedures for the adoption of rules of general applicability: the need for procedural innovation in administrative rulemaking. 2 ACUS 834 (1973), and 60 CALIF. L. REV. 1276 (1972).

Recommendation 72-5: "Procedures for the Adoption of Rules of General Applicability." 1 C.F.R. § 305.72-5 (1993).

183. **Hamilton, Robert W.** Role of nongovernmental standards in the development of mandatory Federal standards affecting safety or health. 1978 ACUS 247, and 56 TEX. L. REV. 1329 (1978).

Recommendation 78-4: "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation." 1 C.F.R. § 305.78-4 (1993), and 44 FED. REG. 1,357 (Jan. 5, 1979).

184. **Hamilton, Robert W.** Rulemaking on a record by the Food and Drug Administration. 2 ACUS 448 (1973), and 50 TEX. L. REV. 1132 (1972).

Recommendation 71-7: "Rulemaking on a Record by the Food and Drug Administration." 2 ACUS 42 (1973), and 1971-72 ACUS ANN. REP. 66..

185. **Harter, Philip J.** Negotiating regulations: a cure for malaise. 1982 ACUS 301 (Vol. 1), and 71 GEO. L.J. 1 (1982).

Recommendation 82-4: "Procedures for Negotiating Proposed Regulations." 1 C.F.R. § 305.82-4 (1993), and 47 FED. REG. 30,708 (July 15, 1982).

186. **Harter, Philip J.** Neither cop nor collection agent: encouraging administrative settlements by ensuring mediator confidentiality. 1988 ACUS 839, and 41 ADMIN. L. REV. 315 (1989).

Recommendation 88-11: "Encouraging Settlements by Protecting Mediator Confidentiality." 1 C.F.R. § 305.88-11 (1993), and 54 FED. REG. 5,212 (Feb. 2, 1989).

187. **Harter, Philip J.** Points on a continuum: dispute resolution procedures and the administrative process. 1986 ACUS 165. *Abridged:* 1 ADMIN. L.J. AM. U. 141 (1987).

Recommendation 86-3: "Agencies' Use of Alternate Means of Dispute Resolution." 1 C.F.R. § 305.86-3 (1993), and 51 FED. REG. 25,643 (July 16, 1986).

188. **Harter, Philip J.** Standards of conduct for Presidential transition workers. 1988 ACUS 77. *Also:* Proposed standards of conduct for Presidential transition workers. 36 FED. BAR NEWS & J. 130 (1989).

Recommendation 88-1: "Presidential Transition Workers' Code of Ethical Conduct." 1 C.F.R. § 305.88-1 (1993), and 53 FED. REG. 26,026 (July 11, 1988).

189. **Harter, Philip J., and George C. Eads.** Policy instruments, institutions, and objectives: an analytical framework for assessing "alternatives" to regulation. 37 ADMIN. L. REV. 221 (1985).

190. **Healy, Michael P.** An evaluation of the fairness and effectiveness of the judicial review preclusion provision in the Superfund statute. Unpublished report, October 1995, and forthcoming VA. ENVTL. L.J.

191. **Hodges, Ann C.** Dispute resolution under the Americans with Disabilities Act. 1994-1995 ACUS 581, and forthcoming ADMIN. L.J. AM. U., Vol. 9, no. 4 (1996).

    Recommendation 95-7. "Use of Mediation wunder the Americans with Disabilities Act." 60 FED. REG. 43,115 (Aug. 18, 1995).

192. **Hornstein, Donald T.** Regulating pesticides: FIFRA registration, reregistration, suspension, and cancellation procedures. 1993 ACUS 441.

    Recommendation 93-5: "Procedures for Regulation of Pesticides." 59 FED. REG. 4,675 (Feb. 1, 1994).

193. **Hostetler, Zona Fairbanks.** Nonlawyer assistance to individuals in Federal mass justice agencies: the need for improved guidelines. 1986 ACUS 47, and 2 ADMIN. L.J. AM. U. 85 (1988).

    Recommendation 86-1: "Nonlawyer Assistance and Representation." 1 C.F.R. § 305.86-1 (1993), and 51 FED. REG. 25,641 (July 16, 1986).

194. **ICF, Inc.** The establishment of a Federal roster of specialists in dispute resolution: issues and options. Unpublished report, 1988.

195. **Jackson, John H., and William J. Davey.** Reform of the administrative procedures used in U.S. antidumping and countervailing duty cases. 1991 ACUS 909, and 6 ADMIN. L.J. AM. U. 399 (1992).

    Recommendation 91-10: "Administrative Procedures Used in Antidumping and Countervailing Duty Cases." 1 C.F.R. § 305.91-10 (1993), and 56 FED. REG. 67,144 (Dec. 30, 1991).

196. **Johnson, George Robert, Jr.** The split-enforcement model: some conclusions from the OSHA and MSHA experiences. 1986 ACUS 293, and 39 ADMIN. L. REV. 315 (1987).

    Recommendation 86-4: "The Split-Enforcement Model for Agency Adjudication." 1 C.F.R. § 305.86-4 (1993), and 51 FED. REG. 46,986 (Dec. 30, 1986).

197. **Johnson, Phillip E.** Federal parole procedures. 2 ACUS 706 (1973), and 25 ADMIN. L. REV. 459 (1973).

    Recommendation 72-3: "Procedures of the U.S. Board of Parole." 2 ACUS 58 (1973) and 1971-72 ACUS ANN. REP. 80. [Note: This recommendation has been largely implemented by PUB. L. 94-233 and agency regulation]..

198. **Jordan, Ellen R.** The Administrative Procedure Act's "good cause" exemption. 1983 ACUS 49, and 36 ADMIN. L. REV. 113 (1984).

Recommendation 83-2: "The 'Good Cause' Exemption From APA Rulemaking Requirements." 1 C.F.R. § 305.83-2 (1993), and 48 FED. REG. 31,180 (July 7, 1983).

199. **Joseph, Daniel, and Michelle L. Gilbert.** Breaking the settlement ice: the use of settlement judges in administrative proceedings. 1988 ACUS 281, and 13 ADMIN. L.J. AM. U. 571 (1989).

Recommendation 88-5: "Agency Use of Settlement Judges." 1 C.F.R. § 305.88-5, and 53 FED. REG. 26,030 (July 11, 1988).

200. **Jost, Timothy Stoltzfus.** Administrative law issues involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: analysis and recommendations. 1989 ACUS 77, and 50 OHIO ST. L.J. 1 (1989). *Also:* Medicare peer review organizations. 1 QUAL. ASSURANCE IN HEALTH CARE 235 (1989) [British].

Recommendation 89-1: "Peer Review and Sanctions in the Medicare Program." 1 C.F.R. § 305.89-1 (1993), and 54 FED. REG. 28,965 (July 10, 1989)

201. **Jost, Timothy Stoltzfus.** The Attorney General's policy on consent decrees and settlement agreements. Commentary. 39 ADMIN. L. REV. 101 (1987). *Abridged:* The Justice Department's settlement policy: is "no deal" a bad deal? 13 LITIG., Spring 1987, at 3.

202. **Kartalia, David E.** Report of the Office of the Chairman in support of recommendation no. 13. 1 ACUS 274 (1971).

Recommendation 69-5 [Originally Recommendation no. 13]: "Elimination of Duplicative Hearings in FAA Safety Decertification Cases." 1 ACUS 25 (1971), and 1969 ACUS ANN. REP. 42.

203. **Katzen, Sally,** et al. Testimony before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in support of the reauthorization of the Administrative Conference of the United States, April 21, 1994. 8 ADMIN. L.J. AM. U. 649 (1994). Testimony by Sally Katzen, Thomas M. Susman, Thomas O. Sargentich, David C. Vladeck, and Alan W. Heifetz.

204. **Kerwin, Cornelius, and Laura Langbein.** An evaluation of negotiated rulemaking at the Environmental Protection Agency: Phase I. Unpublished final report, September 1995.

205. **Kinney, Eleanor D.** The Medicare appeals system for coverage and payment disputes. 1986 ACUS 339, and 1 ADMIN. L.J. AM. U. 1 (1987).

Recommendation 86-5: "Medicare Appeals." 1 C.F.R. § 305.86-5 (1993), and 51 FED. REG. 46,987 (Dec. 30, 1986).

206. **Kinney, Eleanor D.** National coverage policy under the Medicare program: problems and proposals for change. 1987 ACUS 833, and 32 ST. LOUIS U. L.J. 869 (1988).

Recommendation 87-8: "National Coverage Determinations Under the Medicare Program." 1 C.F.R. § 305.87-8 (1993), and 52 FED. REG. 49,144 (Dec. 30, 1987).

207. **Kinney, Eleanor D.** Rule and policymaking for the Medicaid program: a challenge to federalism. 1990 ACUS 677, and 51 OHIO ST. L.J. 855 (1990).

Recommendation 90-8: "Rulemaking and Policymaking in the Medicaid Program." 1 C.F.R. § 305.90-8 (1993), and 55 FED. REG. 53,273 (Dec. 28, 1990).

208. **Koch, Charles H., Jr., and David A. Koplow.** The fourth bite at the apple: a study of the operation and utility of the Social Security Administration's Appeals Council. 1987 ACUS 625, and 17 FLA. ST. U. L. REV. 199 (1990).

Recommendation 87-7: "A New Role for the Social Security Appeals Council." 1 C.F.R. § 305.87-7 (1993), and 52 FED. REG. 49,143 (Dec. 30, 1987).

209. **Kornhauser, Lewis A., and Richard L. Revesz.** De minimis settlements under Superfund. 1992 ACUS 691.

Recommendation 92-9: "De Minimis Settlements Under Superfund." 1 C.F.R. § 305.92-9 (1993), and 57 FED. REG. 61,766 (Dec. 29, 1992).

210. **Kovacic, William E.** The choice of forum in bid protest disputes. 1994-1995 ACUS 507. *Also:* Procurement reform and the choice of forum in bid protest disputes. Forthcoming ADMIN. L.J. AM. U., Vol. 9, no. 3 (1995).

Recommendation 95-6. "Government Contract Bid Protests." 60 FED. REG. 43,113 (Aug. 18, 1995).

211. **Kratzke, William P.** Some recommendations concerning tort liability of government and its employees for torts and constitutional torts. Unpublished draft report, November 1993.

212. **Krent, Harold J.** Monitoring the Federal government's conduct through fee shifting under the Equal Access to Justice Act: an inconclusive experiment. 1992 ACUS 333. *Also:* Fee shifting under the Equal Access to Justice Act: a qualified success. 11 YALE L. & POL'Y REV. 458 (1993).

Recommendation 92-5: "Streamlining Attorney's Fees Litigation Under the Equal Access to Justice Act." 1 C.F.R. § 305.92-5 (1993), and 57 FED. REG. 30,108 (July 8, 1992), and 57 FED. REG. 32,881 (July 24, 1992).

213. **Krent, Harold J., and Nicholas S. Zeppos.** Monitoring governmental divestiture of assets: regulatory substitutes for market controls. Unpublished report, October 1995.

214. **Kress, Jack M., and Carole D. Iannelli.** Administrative search and seizure: whither the warrant? 31 VILL. L. REV. 705 (1986).

215. **Kurzman, Stephen.** Uniform minimum procedures for agencies administering grant programs. 2 ACUS 181 (1973).

Recommendation 71-4 [Originally Recommendation no. 26]: "Minimum Procedures for Agencies Administering Discretionary Grant Programs." 1 C.F.R. § 305.71-4 (1988), and 38 FED. REG. 19,782, July 23, 1973, as amended at 54 FED. REG. 6,861, Feb. 15, 1989).

216. **Legomsky, Stephen H.** Forum choices for the review of agency adjudication: a study of the immigration process. 1985 ACUS 505, and 71 IOWA L. REV. 1297 (1986).

Recommendation 85-4: "Administrative Review in Immigration Proceedings." 1 C.F.R. § 305.85-4 (1993), and 50 FED. REG. 52,894 (Dec. 27, 1985).

217. **Legomsky, Stephen H.** A research agenda for immigration law: a report to the Administrative Conference of the United States. 25 SAN DIEGO L. REV. 227 (1988).

218. **Leibowitz, Arnold H.** Civil forfeiture: the issues and some recommendations. 1994-1995 ACUS 175.

Recommendation 94-2: "Reforming the Government's Procedures for Civil Forfeiture." 59 FED. REG. 44,703 (Aug. 30, 1994).

219. **Leibowitz, Arnold H.** Comparative analysis of immigration in key developed countries in relation to immigration reform and control legislation in the United States. 7 HUM. RTS. L.J. 1 (1986).

220. **Leifer, Jacqueline C.** Implementation of the Federal Debt Collection Act of 1982. 1984 ACUS 899.

221. **Lerman, Lisa G.** Public service by public servants. 19 HOFSTRA L. REV. 1141 (1991).

222. **Lesnick, Howard.** Grievance procedures in Federal prisons: practices and proposals. 123 U. PA. L. REV. 1 (1974).

223. **Levin, Ronald M.** An introduction to direct final rulemaking. 1994-1995 ACUS 443, and 64 GEO. WASH. L. REV. 1 (1995).

Recommendation 95-4. "Procedures for Noncontroversial and Expedited Rulemaking." 60 FED. REG. 43,110 (Aug. 18, 1995).

224. **Levin, Ronald M.** Judicial review and the Bumpers Amendment. 1979 ACUS 565, and at 264 *in:* M.L. Rosenberg and B.B. McGovern, eds. Current issues in regulatory reform. Washington, D.C.: Federal Bar Association, 1980.

Recommendation 79-6: "Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment." 1 C.F.R. § 305.79-6 (1988), and 45 FED. REG. 2,308 (Jan. 11, 1980), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

Recommendation 81-2: "Current Versions of the Bumpers Amendment." 1 C.F.R. § 305.81-2 (1988), and 46 FED. REG. 62,806 (Dec. 29, 1981), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989). [Note: Legislation opposed by the Conference in this recommendation was not enacted by Congress].

225. **Levinson, L. Harold.** The central panel system: a framework that separates ALJs from administrative agencies. 65 JUDICATURE 236 (1981).

226. **Levinson, L. Harold.** Congressional oversight of agency rulemaking: options available after *Chadha.* At App. B *in:* Administrative Conference of the U.S. (Office of the Chairman). Legislative veto of agency rules after *INS v. Chadha. Supra* no. 19. *Drawn on an earlier report adapted as:* Levinson, L. Harold. Legislative and executive veto of rules of administrative agencies: models and alternatives. *Infra* no. 226.

227. **Levinson, L. Harold.** Legislative and executive veto of rules of administrative agencies: models and alternatives. 24 WM. & MARY L. REV. 79 (1982).

228. **Lockhart, William J.** The origin and use of "Guidelines for the study of informal action in Federal agencies." 24 ADMIN. L. REV. 167 (1972). [Includes Guidelines for the study of informal action in Federal agencies, at 173-203].

229. **Lockhart, William J.** Report on study of no-action letters and related advisory processes administered by the Division of Corporation Finance, Securities and Exchange Commission. 1 ACUS 440 (1971).

Recommendation 70-2 [Originally Recommendation no. 19]: "S.E.C. No-Action Letters Under Section 4 of the Securities Act of 1933." 1 ACUS 34 (1971), and 1970-71 ACUS ANN. REP. 40.

230. **Lowenfeld, Andreas F.** Binational dispute settlement under Chapter 19 of the Canada-United States Free Trade Agreement: an interim appraisal. 24 N.Y.U. J. INT'L L. & POL. 269 (1991).

231. **Lubbers, Jeffrey S.** Administrative law as seen from the D.C. Circuit: an interview with Chief Judge Patricia M. Wald. 34 FED. BAR NEWS & J. 15 (1987).

232. **Lubbers, Jeffrey S.** Anatomy of a regulatory program: comment on "Strategic regulators and the choice of rulemaking procedures." 57 LAW & CONTEMP. PROBS. 161 (Spring 1994). [Comment on Hamilton, James T., an Christopher H. Schroeder. Strategic regulators and the choice of rulemaking procedures: the selection of formal vs. informal rules in regulating hazardous waste. 57 LAW & CONTEMP. PROBS. 111 (Spring 1994)].

233. **Lubbers, Jeffrey S.** Better regulations: the National Performance Review's regulatory reform recommendations. 43 DUKE L.J. 1165 (1994). *Condensed:* The regulatory reform recommendations of the National Performance Review. 6 RISK: HEALTH, SAFETY & ENV'T 153 (1995).

234. **Lubbers, Jeffrey S.** The Federal administrative judiciary: establishing an appropriate system of performance evaluation for ALJs. 7 ADMIN. L.J. AM. U. 589 (1994). *Drawn from:* Verkuil, Paul R., Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey S. Lubbers. The Federal administrative judiciary. 1992 ACUS 773. *Infra* no. 385.

235. **Lubbers, Jeffrey S.** Federal administrative law judges: a focus on our invisible judiciary. 33 ADMIN. L. REV. 109 (1981).

236. **Lubbers, Jeffrey S.** Federal agency adjudications: trying to see the forest and the trees. 31 FED. BAR NEWS & J. 383 (1984).

237. **Lubbers, Jeffrey S.** Improving government regulations: guide on agency reports under Executive Order 12044. 43 FED. REG. 36,411 (Aug. 16, 1978).

238. **Lubbers, Jeffrey S.** Justice Breyer: purveyor of common sense in many forums. 8 ADMIN. L.J. AM. U. 775 (1995).

239. **Lubbers, Jeffrey S.** Management of Federal agency adjudication. At 287-323 *in:* Rosenbloom, David H. and Richard D. Schwartz, eds. Handbook of regulation and administrative law. New York: Marcel Dekker, 1994.

240. **Lubbers, Jeffrey S.** Passive restraints and activist courts: the story of Federal regulation of auto safety. 6 ADMIN. L.J. AM. U. 721 (1993). [Reviewing: Mashaw, Jerry L. and David L. Harfst. The struggle for auto safety. Cambridge, MA: Harvard Univ. Pr., 1990].

241. **Lubbers, Jeffrey S..** Risk regulation at the Federal level: administrative procedure constraints and opportunities. 1 RISK: ISSUES IN HEALTH & SAFETY 43 (1990).

242. **Lubbers, Jeffrey S.** A unified corps of ALJs: a proposal to test the idea at the Federal level. 65 JUDICATURE 266 (1981).

243. **Lubbers, Jeffrey S., and Nancy G. Miller.** The procedural and practice rule exemption from the APA notice-and-comment rulemaking requirements. 1992 ACUS 59. *Also:* The APA procedural rule exemption: looking for a way to clear the air. 6 ADMIN. L.J. AM. U. 481 (1992).

Recommendation 92-1: "The Procedural and Practice Exemption From the APA Notice-and-Comment Rulemaking Requirements." 1 C.F.R. § 305.92-1 (1993), and 57 FED. REG. 30,102 (July 8, 1992).

244. **Luneburg, William V.** Contracting by the Federal government for legal services: a legal and empirical analysis. 1987 ACUS 279, and 63 NOTRE DAME L. REV 399 (1988).

Recommendation 87-3: "Agency Hiring of Private Attorneys." 1 C.F.R. § 305.87-3 (1993), and 52 FED. REG. 23,634 (June 24, 1987).

245. **Luneburg, William V.** The Federal personnel complaint, appeal and grievance system: a structural overview and proposed revisions. 1989 ACUS 895, and 78 KEN. L.J. 1 (1989-90).

Statement 15: "Procedures for Resolving Federal Personnel Disputes." 1 C.F.R. § 310.15 (1993), and 54 FED. REG. 53,498 (Dec. 29, 1988).

246. **Luneburg, William V.** Petitions for rulemaking: Federal agency practice and recommendations for improvement. 1986 ACUS 493. *Reprinted:* At Appendix 15B *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. *Also:* Petitioning Federal agencies for rulemaking: an overview of administrative and judicial practice and some recommendations for improvement. 1988 WIS. L. REV. 1 (1988).

Recommendation 86-6: "Petitions for Rulemaking." 1 C.F.R. § 305.86-6 (1993), and 51 FED. REG. 46,988 (Dec. 30, 1986).

247. **Luneburg, William V., David M. Altschuler, and Michael E. Bell.** The Office of Juvenile Justice and Delinquency Prevention formula grant program: a regulatory approach to Federal grant-making. 1992 ACUS 563. *Also:* The Office of Juvenile Justice and Delinquency Prevention's formula grant program: insights from interdisciplinary research outside the well-trodden paths of administrative law. 45 ADMIN. L. REV. 225 (1993).

Recommendation 92-8: "Administration of the Office of the Juvenile Justice and Delinquency Prevention's Formula Grant Program." 1 C.F.R. § 305.92-8 (1993), and 57 FED. REG. 61,765 (Dec. 29, 1992).

248. **Macey, Jonathan R., and Geoffrey P. Miller.** Bank failures, risk monitoring, and the market for bank control. 88 COLUM. L. REV. 1153 (1988).

249. **Madden, Thomas J.** Certification requirements under the Contract Disputes Act. 1983 ACUS 23.

Recommendation 83-1: "The Certification Requirement in the Contract Disputes Act." 1 C.F.R. § 305.83-1 (1993), and 48 FED. REG. 31,179 (July 17, 1983), as amended at 57 FED. REG. 61,768 (Dec. 29, 1992). [Note: Congress corrected the problem identified by this recommendation in the Court of Federal Claims Technical and Procedural Improvement Act of 1992, PUB. L. 102-572, Title IX].

250. **Madden, Thomas J., and Nicholas W. Allard.** Advice on official liability and immunity. 1982 ACUS 201 (Vol. 2). *Chapter 4 revised:* Madden, Thomas J., Nicholas W. Allard, and David H. Remes. Bedtime for *Bivens*: substituting the United States as defendant in constitutional tort suits. 20 HARV. J. ON LEGIS. 469 (1983).

Recommendation 82-6: "Federal Officials' Liability for Constitutional Violations." 1 C.F.R. § 305.82-6 (1993), and 47 FED. REG. 58,208 (Dec. 30, 1982).

251. **Malloy, Michael P.** Adjudication practices and procedures of the Federal bank regulatory agencies. 1987 ACUS 1215. *Revised:* Balancing public confidence and confidentiality: adjudication practices and procedures of the Federal bank regulatory agencies. 61 TEMP. L. REV. 723 (1988).

Recommendation 87-12: "Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies." 1 C.F.R. § 305.87-12 (1992), and 52 FED. REG. 49,151 (Dec. 30, 1987), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992). [Note: This recommendation was implemented by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, PUB. L. 101-73, 101 STAT. 183, and by subsequent agency actions].

252. **Malloy, Michael P.** The 12 (i)ed monster: administration of the Securities Exchange Act of 1934 by the Federal bank regulatory agencies. 19 HOFSTRA L. REV. 269 (1990).

253. **Mariner, Wendy K.** Innovation and challenge: the first year of the National Vaccine Injury Compensation Program. 1991 ACUS 409.

Recommendation 91-4: "The National Vaccine Injury Compensation Program." 1 C.F.R. § 305.91-4 (1993), and 56 FED. REG. 33,850 (July 24, 1991).

254. **Martin, David A.** Reforming asylum adjudication. 1989 ACUS 233. *Also:* Reforming asylum adjudication: on navigating the coast of Bohemia. 138 U. PA. L. REV. 5 (1990).

Recommendation 89-4: "Asylum Adjudication Procedures." 1 C.F.R. § 305.89-4 (1993), and 54 FED. REG. 28,970 (July 10, 1989).

255. **Martin, David A. and Philip Martin.** Coordination of migrant and seasonal farmworker service programs. 1992 ACUS 197. *Expanded:* Martin, Philip L. and David A. Martin. The endless quest: helping America's farm workers. Boulder, CO: Westview Pr., 1994.

Recommendation 92-4: "Coordination of Migrant and Seasonal Farmworker Service Programs." 1 C.F.R. § 305.92-4 (1993), and 57 FED. REG. 30,166 (July 8, 1992).

256. **Martin, Peter W.** Procedures used in forming and carrying out Federal-state agreements under the Supplemental Security Income Program. 1979 ACUS 71.

Recommendation 79-2: "Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program." 1 C.F.R. § 305.7 (1993), and 44 FED. REG. 38,823 (July 3, 1979).

257. **Mashaw, Jerry L.** Improving the environment of agency rulemaking: an essay on management, games, and legal political accountability. 1993 ACUS 349, and 57 LAW & CONTEMP. PROBS. 185 (Spring 1994).

Recommendation 93-4: "Improving the Environment for Agency Rulemaking." 59 FED. REG. 4,670 (Feb. 1, 1994).

258. **Mashaw, Jerry L.** The management side of due process: some theoretical and litigation notes on the assurance of accuracy, fairness, and timeliness in the adjudication of social welfare claims. 59 CORNELL L. REV. 772 (1974).

259. **Mashaw, Jerry L.** Private enforcement of public regulatory provisions: the "citizen suit." 4 CLASS ACTION REP. 29 (1975).

260. **Mashaw, Jerry L.** Quality assurance systems in the adjudication of claims of entitlement to benefits or compensation. 3 ACUS 160 (1975).

Recommendation 73-3: "Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation." 1 C.F.R. § 305.73-3 (1988), and 3 ACUS 21 (1975).

261. **Mashaw, Jerry L.** Report to the Grants and Benefits Committee, ACUS, on the social security hearings and appeals process. 1978 ACUS 81. *Drawn from:* Mashaw, Jerry L., et al. Social security hearings and appeals. Lexington, MA: D.C. Heath, 1978.

Recommendation 78-2: "Procedures for Determining Social Security Disability Claims." 1 C.F.R. § 305.78-2 (1993), and 43 FED. REG. 27,508 (June 26, 1978).

262. **Mason, Malcolm S.** Current trends in Federal grant law: fiscal year 1976. 35 FED. BAR J. 163 (1976).

263. **Mason, Malcolm S.** Why can't grants statutes be drafted better? ASSISTANCE MGMT. J., Spring 1986 (Vol. 3, no. 1), at 3.

264. **McGarity, Thomas O.** Multi-party forum shopping for appellate review of administrative action. 1980 ACUS 437, and 129 U. PA. L. REV. 302 (1980).

Recommendation 80-5: "Eliminating or Simplifying the 'Race to the Courthouse' in Appeals From Agency Action." 1 C.F.R. § 305.80-5 (1988), and 54 FED. REG. 84,954 (Dec. 24, 1990), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989). [Note: This recommendation has been implemented by PUB. L. 100-236, Selection of Court for Multiple Appeals, 101 STAT. 1731].

265. **McGarity, Thomas O.** Peer review in awarding discretionary grants in the arts and sciences. 1993 ACUS 179. *Also:* Peer review in awarding Federal grants in the arts and sciences. 9 HIGH TECH. L.J. 1 (1994).

Recommendation 93-3: "Peer Review in the Award of Discretionary Grants." 58 FED. REG. 45,412 (Aug. 30, 1993).

266. **McGarity, Thomas O.** The role of regulatory analysis in regulatory decisionmaking. 1985 ACUS 107. *Abridged:* Regulatory analysis and regulatory reform. 65 TEX. L. REV. 1243 (1987). *Expanded:* Reinventing rationality: the role of regulatory analysis in the Federal bureaucracy. New York: Cambridge Univ. Pr., 1991.

Recommendation 85-2: "Agency Procedures for Performing Regulatory Analysis of Rules." 1 C.F.R. § 305.85-2 (1993), and 50 FED. REG. 28,364 (July 12, 1985).

267. **McGarity, Thomas O., and Sidney A. Shapiro.** OSHA regulation: regulatory alternatives and legislative reform. 1987 ACUS 999. *Revised:* Shapiro, Sidney A., and Thomas O. McGarity. Reorienting OSHA: regulatory alternatives and legislative reform. 6 YALE J. ON REG. 1 (1989).

Recommendation 87-1: "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration." 1 C.F.R. § 305.87-1 (1992), and 52 FED. REG. 23,629 (June 24, 1987), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992). [Note: Recommendation 87-1 contains advice to OSHA on internal management improvements to its rulemaking process. Recommendation 87-10 addresses broader reforms of OSHA rulemaking].

Recommendation 87-10: "Regulation by the Occupational Safety and Health Administration." 1 C.F.R. § 305.87-10 (1993). and 52 FED. REG. 49,147 (Dec. 30, 1987)

268. **McGarity, Thomas O., and Sidney A. Shapiro.** OSHA rulemaking procedures. 1987 ACUS 79.

Recommendation 87-1: "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration." 52 FED. REG. 23,629 (June 24, 1987), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992). [Note: This recommendation contains advice to OSHA on internal management improvements to its rulemaking. Recommendation 87-10 addresses broader reforms of OSHA rulemaking].

269. **McGowan, Carl.** The Administrative Conference: guardian and guide of the regulatory process. 53 GEO. WASH. L. REV. 67 (1985).

270. **McGregor, John.** Collection of delinquent taxes. At 27 *in:* U.S. Congress. House. Comm. on Ways and Means. Administrative procedures of the Internal Revenue Service. 94th Cong., 2d Sess. Comm. Prt. Washington, D.C.: U.S. Gov't Prt. Off., 1976. *Also:* At 203 *in:* Davenport, Charles. Administrative procedures of the Internal Revenue Service. *Supra* no. 132.

Recommendation 75-6: "Internal Revenue Service Procedures: Collection of Delinquent Taxes." 41 FED. REG. 3,982 (Jan. 27, 1976).

271. **Meidinger, Errol.** Regulatory federalism under "partial preemption" statutes. Unpublished final draft report, September 1993.

272. **Merrill, Richard A.** Federal regulation of cancer-causing chemicals. 1982 ACUS 21 (Vol. 2). *Also:* CPSC regulation of cancer risks in consumer products: 1972-1981. 67 VA. L. REV. 1261 (1981). *Also:* FDA regulation of environmental contaminants of food. 66 VA. L. REV. 1357 (1980).

Recommendation 82-5: "Federal Regulation of Cancer-Causing Chemicals." 1 C.F.R. § 305.82-5, and 47 FED. REG. 30,710 (July 15, 1982).

273. **Merrill, Richard A.** Procedures for adverse actions against Federal employees. 2 ACUS 1007 (1973).

Recommendation 72-8: "Adverse Actions against Federal Employees." 2 ACUS 73 (1975).

274. **Michael, Douglas C.** Federal agency use of audited self-regulation as a regulatory technique. 1994-1995 ACUS 65, and 47 ADMIN. L. REV. 171 (1995).

Recommendation 94-1: "The Use of Audited Self-Regulation as a Regulatory Technique." 59 FED. REG. 44,701 (Aug. 30, 1994).

275. **Michael, Douglas C.** Programs for decentralized implementation of federal regulations: audited self-regulation, self-enforcement. Unpublished paper, November 10, 1994.

276. **Michael, Douglas C.** Cooperative implementation of federal regulations. Unpublished draft report, October 1995.

277. **Morgan, Thomas D.** Administrative law: the regulation of policy making. Unpublished working draft, November 1986.

278. **Morgan, Thomas D.** Appropriate limits on participation in matters before an agency by a former agency official. 1979 ACUS 599. *Also:* Appropriate limits on participation by a former agency official in matters before an agency. 1980 DUKE L.J. 1.

Recommendation 79-7: "Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency." 1 C.F.R. 305.79-7 (1992). 45 FED. REG. 2,309 (Jan. 11, 1980), as amended at 57 FED. REG. 61,768 (Dec. 29, 1992) and 58 FED. REG. 4,295 (Jan. 14, 1993). [Note: This recommendation has become moot as a result of the Ethics Reform Act of 1989, PUB. L. 101-194, 103 STAT. 1716].

279. **Morgan, Thomas D.** Public financial disclosure by Federal officials: a functional approach. 1989 ACUS 447, and 3 GEO. J. LEGAL ETHICS 217 (1989). Also: Revision of Federal financial disclosure requirements. November 1988. In: Administrative Conference of the U (Office of the Chairman). Sourcebook on government ethics for Presidential appointees. *Supra* no. 29.

Recommendation 89-6: "Public Financial Disclosure by Executive Branch Officials." 1 C.F.R. § 305.89-6.

280. **Morgan, Thomas D.** The regulatory budget: the illusion of rationality in regulatory policy making. Unpublished working draft, December 1987.

281. **Morgan, Thomas D.** Toward a revised strategy for ratemaking. 1978 ACUS 23, and 78 U. ILL. L. F. 21 (1978).

Recommendation 78-1: "Reduction of Delay in Ratemaking Cases." 1 C.F.R. § 305.78-1.

282. **Mullins, Morell E.** The use of settlement judges and simplified proceedings in enforcement actions before the Occupational Safety & Health Review Commission. 1990 ACUS 495. *Also:* Alternative dispute resolution and the Occupational Safety and Health Review Commission: settlement judges and simplified proceedings. 5 ADMIN. L.J. AM. U. 555 (1991).

Recommendation 90-6: "Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission." 1 C.F.R. § 305.90-6 (1993), and 55 FED. REG. 53,271 (Dec. 28 1990).

283. **Murphy, Arthur W.** The National Environmental Policy Act and the licensing process: environmentalist Magna Carta or agency coup de grace? 3 ACUS 363 (1975), and 72 COLUM. L. REV. 963 (1972).

Recommendation 73-6: "Procedures for Resolution of Environmental Issues in Licensing Proceedings." 3 ACUS 31 (1975), and 39 FED. REG. 4,848 (Feb. 7, 1974).

284. **Nafziger, James A. R.** Report on reviewability of visa denials by consular officers. 1989 ACUS 587. *Also:* Review of visa denials by consular officers. 66 WASH. L. REV. 1 (1991).

Recommendation 89-9: "Processing and Review of Visa Denials." 1 C.F.R. § 305.89-9 (1993), and 54 FED. REG. 53,496 (Dec. 29, 1989).

285. **Nathanson, Nathaniel L.** The administrative court proposal. 2 ACUS 198 (1973), and 57 VA. L. REV. 996 (1971).

Statement 1: "Views of the Administrative Conference on the 'Report on Selected Independent Regulatory Agencies' of the President's Advisory Council on Executive Organization." 2 ACUS 27 (1973), 1970-71 ACUS ANN. REP. 60, 38 FED. REG. 19,794 (1973), and 57 VA. L. REV. 927 (1971).

286. **Nathanson, Nathaniel L.** Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings. 4 ACUS 841 (1979), and 30 ADMIN. L. REV. 377 (1978).

Recommendation 77-3: "Ex Parte Communications in Informal Rulemaking Proceedings." 1 C.F.R. § 305.77-3 (1993), and 45 FED. REG. 54,253 (Oct. 5, 1977).

287. **National Institute for Dispute Resolution.** Use of alternative dispute resolution to enhance ESA implementation . Draft public involvement recommendations. August 25, 1995.

288. **Neely, Alfred S., IV.** Statutory inhibitions to the application of principles of cost/benefit analysis in administrative decision making. 1985 ACUS 37, and 23 DUQ. L. REV. 489 (1985).

Recommendation 85-1: "Legislative Preclusion of Cost/Benefit Analysis." 1 C.F.R. § 305.85-1 (1993), and 50 FED. REG. 28,363 (July 12, 1985).

289. **North, David S., and Anna Mary Portz.** Decision factories: the role of the regional processing facilities in the alien legalization programs. 1989 ACUS 819.

Statement 14: "Mass Decisionmaking Programs: The Alien Legalization Experience." 1 C.F.R. § 310.14 (1991), and 54 FED. REG. 28,975 (July 10, 1989), as amended at 54 FED. REG. 61,769 (Dec. 29, 1992).

290. **Ogden, Gregory L.** Report on public regulation of siting of industrial development projects. 1984 ACUS 45.

Recommendation 84-1: "Public Regulation of Siting of Industrial Development Projects." 1 C.F.R. § 305.84-1 (1993), and 49 FED. REG. 29,938 (July 25, 1984).

291. **O'Reilly, James T.** Regaining a confidence: protection of business confidential data through reform of the Freedom of Information Act. 1982 ACUS 29 (Vol. 1), and 34 ADMIN. L. REV. 263 (1982).

Recommendation 82-1: "Exemption (b)(4) of the Freedom of Information Act." 1 C.F.R. 305.82-1 (1988), and 47 FED. REG. 30,702 (July 15, 1982), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989). [Note: The President in 1987 issued Executive Order 12600, which requires agencies to follow procedures similar to those recommended by the Administrative Conference].

292. **Paglin, Max D.** Procedural implications of administering emergency shortages of natural gas. 4 ACUS 871 (1979).

Statement 5: "Statement on Procedures to Deal with Emergency Shortages of Natural Gas." 41 FED. REG. 56,770 (1976).

293. **Park, Robert E.** Report of the Committee on Personnel in support of adequate hearing facilities. 1 ACUS 48 (1971).

Recommendation 68-l: "Adequate Hearing Facilities." 1 C.F.R. § 305.68-1 (1988), 38 FED. REG. 19,782, July 23, 1973, as amended at 54 FED. REG. 6,861, Feb. 15, 1989.

294. **Park, Robert E.** Several matters in regard to examiners and government attorneys. 1 ACUS 381 (1971).

Recommendation 69-9: "Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government." 1 C.F.R. § 305.69-9 (1988), and 38 FED. REG. 19,782 (July 23, 1973), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

295. **Perritt, Henry H., Jr.** Adjudication of civil penalties under the Federal Aviation Act. 1991 ACUS 765.

Recommendation 91-8: "Adjudication of Civil Penalties Under the Federal Aviation Act." 1 C.F.R. § 305.91-8 (1993), and 56 FED. REG. 67/141 (Dec. 30, 1991).

296. **Perritt, Henry H., Jr.** Analysis of four negotiated rulemaking efforts. 1985 ACUS 637. *Also:* Negotiated rulemaking: an evaluation. 74 GEO. L.J. 1625 (1986). *Abridged:* Negotiated rulemaking in administrative law. 38 ADMIN. L. REV. 471 (1986). *Expanded:* Negotiated rulemaking in practice. 5 J. POL'Y ANALYSIS & MGMT. 482 (1986).Cite is OK *Partially reprinted:* At Appendix 15A *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender.

Recommendation 85-5: "Procedures for Negotiating Proposed Regulations." 1 C.F.R. § 305.85-5 (1993), and 50 FED. REG. 52,985 (Dec. 27, 1985).

297. **Perritt, Henry H., Jr.** Electronic acquisition and release of Federal agency information. 1988 ACUS 601, and 141 ADMIN. L. REV. 253 (1989). *Also:* Federal electronic information policy. 63 TEMPLE L. REV. 201 (1990). *Also:* Electronic records management and archives. 53 U. PITT. L. REV. 961 (1992). *Partially reprinted:* At Appendix 7H *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender.

Recommendation 88-10: "Federal Agency Use of Computers in Acquiring and Releasing Information." 1 C.F.R. § 305.88-10 (1993), and 54 FED. REG. 5,209 (Feb. 2, 1989).

298. **Perritt, Henry H., Jr.** Electronic dockets: use of information technology in rulemaking and adjudication. Unpublished report, October 1995.

299. **Perritt, Henry H., Jr.** Federal agency electronic records management and archives. 1990 ACUS 389. *Also:* Electronic records management and archives. 53 U. PITT. L. REV. 963 (1992).

Recommendation 90-5: "Federal Agency Electronic Records Management and Archives." 1 C.F.R. § 305.90-5 (1993), and 55 FED. REG. 53,270 (Dec. 28, 1990).

300. **Pierce, Richard J., Jr.** Regulation, deregulation, federalism and administrative law: agency power to preempt state regulation. 1984 ACUS 517, and 46 U. PITT. L. REV. 607 (1985).

Recommendation 84-5: "Preemption of State Regulation by Federal Agencies." 1 C.F.R. § 305.84-5 (1993), and 49 FED. REG. 49,838 (Dec. 24, 1984).

301. **Pierce, Richard J., Jr.** Use of the Federal rules of evidence in Federal agency adjudications. 1986 ACUS 133, and 39 ADMIN. L. REV. 1 (1987), and reprinted at Appendix 22B *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender.

Recommendation 86-2: "Use of the Federal Rules of Evidence in Federal Agency Adjudications." 1 C.F.R. § 305.86-2 (1993), and 51 FED. REG. 25,642 (July 16, 1986).

302. **Popkin, William D.** The effect of representation in nonadversary proceedings: a study of three disability programs. 62 CORNELL L. REV. 989 (1977).

303. **Pou, Charles, Jr.** The Administrative Conference: an "auxiliary precaution" of the American system. 4 CANADIAN J. ADMIN. L. & PRAC. 57 (1990).

304. **Pou, Charles, Jr.** Governmental uses of alternative dispute resolution. 9 URB., ST. & LOC. L. NEWSL., Winter 1986(Vol. 9, no. 2), at 1.

305. **Pou, Charles, Jr.** Book review: The trial of a social security disability case. 36 ADMIN. L. REV. 209 (1984). [Reviewing: Schwartz, Marvin. The trial of a social security disability case. New York: The Social Security Disability Foundation, 1983].

306. **Pou, Charles, Jr., and Charlotte Jones.** Agency time limits as a tool for reducing regulatory delay. 1986 ACUS 835.

Recommendation 86-7: "Case Management as a Tool for Improving Agency Adjudication." 1 C.F.R. § 305.86-7 (1993), and 51 FED. REG. 46,989 (Dec. 30, 1986).

307. **Powell, Burnele V.** Administratively declaring order: some practical applications of the Administrative Procedure Act's declaratory order process. 64 N.C. L. REV. 277 (1986).

308. **Powell, Burnele V.** Sinners, supplicants, and Samaritans: agency advice giving in relation to Section 554(e) of the Administrative Procedure Act. 63 N.C. L. REV. 339 (1985).

309. **Price, Monroe E.** Executive control of rulemaking: the Office of Administrative Law in California. Report to the Administrative Conference of the U.S. Washington, D.C.: U.S. Gov't Prt. Off., 1981.

310. **Pritzker, David M.** Administrative Conference roundtable on reg-neg. 17 ADMIN. L. NEWS (Winter 1992), at 1. [Held October 3, 1991].

311. **Pritzker, David M.** Negotiation by consensus: negotiated rulemaking in the United States. 1 COM. DISP. RESOL. J. 217 (1995) [Australia].

312. **Pritzker, David M.** Working together for better regulations. 5 NAT. RESOURCES & ENV'T. 29 (Fall 1990). *Revised and updated:* At 40-49, *in:* Garrett, Theodore L., ed. The environmental law manual. Chicago: American Bar Association, 1992. *Second revision and update:* GLOBAL TRADE TALK, July/Aug., 1994, at 9*:*

313. **Pritzker, David M., and William J. Walsh.** Scientific and technical decision-making in the National Flood Insurance Program of the Federal Insurance Administration. Washington, D.C.: ACUS, 1977.

314. **Rabin, Robert L.** Agency criminal referrals in the Federal system: an empirical study of prosecutorial discretion. 24 STAN. L. REV. 1036 (1972).

315. **Rand Institute for Civil Justice.** Evaluating agency ADR programs: a user's guide to data collection and use. [By] Elizabeth Rolph and Erik Moller. N.p.: Rand, September 1994.

316. **Rich, Malcolm C., and Wayne E. Brucar.** The central panel system for administrative law judges: a survey of seven states. Chicago: American Judicature Society, 1983.

317. **Riggs, Douglas A., and Elizabeth K. Dorminey.** Federal agencies' use of alternative means of dispute resolution. 1 ADMIN. L.J. AM. U. 125 (1987).

318. **Riskin, Leonard L.** The Farmer-Lender Mediation Program: implementation by the Farmers Home Administration. 1991 ACUS 687. *Also:* Two concepts of mediation in the FmHA's Farmer-Lender Mediation Program. 45 ADMIN. L. REV. 21 (1993).

Recommendation 91-7: "Implementation of Farmer-Lender Mediation by the Farmers Home Administration." 1 C.F.R. § 305.91-7 1993), and 56 FED. REG. 67,140 (Dec. 30, 1991).

319. **Roberts, Robert N.** A guide to Federal ethics laws for presidential appointees. *In:* Administrative Conference of the U.S. (Office of the Chairman). Sourcebook on government ethics for presidential appointees. *Supra* no. 29.

320. **Robertson, Reuben B., and Mary Candace Fowler.** Recovering attorneys' fees from the government under the Equal Access to Justice Act. 56 TUL. L. REV. 903 (1982).

321. **Robinson, Glen O.** The Forest Service: a study in public land management. Baltimore: John Hopkins Pr., 1975.

322. **Robinson, Glen O.** On reorganizing the independent regulatory agencies. 2 ACUS 218 (1973), and 57 VA. L. REV. 947 (1971).

Statement 1: "Views of the Administrative Conference on the 'Report on Selected Independent Regulatory Agencies' of the President's Advisory Council on Executive Organization." 38 FED. REG. 19,794 (July 23, 1973).

323. **Rochvarg, Arnold.** Reforming the administrative naturalization process: reducing delays while increasing fairness. Forthcoming 9 GEO. IMMIGR. L.J. (Summer 1995).

324. **Rosenblum, Victor G.** The administrative law judge in the administrative process: interrelations of case law with statutory and pragmatic factors in determining ALJ roles. *Reprinted:* At 171-245, *in:* U.S. Congress. House. Comm. on Ways and Means. Subcomm. on Social Security. Recent studies relevant to the disability hearings and appeals crisis. 94th Cong., 1st Sess. Committee print. December 20, 1975. Washington, D.C.: U.S. Gov't Prt. Off., 1975.

325. **Rosenblum, Victor G.** Contexts and contents of "for good cause" as criterion for removal of administrative law judges: legal and policy factors. 1984 ACUS 937, and 6 W. NEW ENG. L. REV. 593 (1984).

326. **Rosenblum, Victor G.** Handling citizen initiated complaints: an introductory study of Federal agency procedures and practices. 3 ACUS 611 (1975), and 26 ADMIN. L. REV. 1 (1974).

327. **Rotunda, Ronald D.** Ethical problems in Federal agency hiring of private attorneys. 1987 ACUS 409, and 1 GEO. J. LEGAL ETHICS 85 (1987).

Recommendation 87-3: "Agency Hiring of Private Attorneys." 1 C.F.R. § 305.87-3 (1993), and 52 FED. REG. 23,632 (June 24, 1987).

328. **Ruttinger, George D.** Acquiring the services of neutrals for alternative means of dispute resolution and negotiated rulemaking. 1986 ACUS 863.

Recommendation 86-8: "Acquiring the Services of 'Neutrals' for Alternative Means of Dispute Resolution." 1 C.F.R. § 305.86-8 (1993), and 51 FED. REG. 46,990 (Dec. 30, 1986).

329. **Sargentich, Thomas O.** Jurisdictional debate in administrative law: a comment on *Telecommunications Research and Action Center v. FCC.* 1988 ACUS 309. *Also:* The jurisdiction of Federal courts in administrative cases: developments. 41 ADMIN. L. REV. 201 (1989).

Recommendation 88-6: "Judicial Review of Preliminary Challenges to Agency Action." 1 C.F.R. § 305.88-6 (1993), and 53 FED. REG. 39,585 (Oct. 11, 1988).

330. **Scalia, Antonin**. The hearing examiner loan program. 1971 DUKE L.J. 319.

331. **Scalia, Antonin, and Frank I. Goodman.** Procedural aspects of the Consumer Product Safety Act. 20 UCLA L. REV. 899 (1973).

332. **Schlesinger, Steven R.**, ed. Venue at the crossroads. Washington, D.C.: National Legal Center for the Public Interest, 1982. *Reprinted in:* 1982 ACUS 219 (Vol. 1). [Original publication not funded by ACUS]. *Contents:* Sen. Paul Laxalt and Linden H. Kettlewell. A return to traditional considerations for determining venue; Nicholas C. Yost. Present venue provisions: flexibility v. inconvenience; David P. Currie. Venue and the Sagebrush Rebellion.

Recommendation 82-3: "Federal Venue Provisions Applicable to Suits Against the Federal Government." 1 C.F.R. § 305.82-3 (1988), and 47 FED. REG. 30,706 (July 15, 1982), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989). [Note: Legislation opposed by the Conference in this recommendation was not enacted by the Congress].

333. **Schotland, Roy A.** Reexamining the Freedom of Information Act's Exemption [8]. 1994-1995 ACUS 211, and 9 ADMIN. L.J. AM. U. 43 (1995).

Recommendation 95-1: "Application and Modification of Exemption 8 of The Freedom of Information Act," 60 FED. REG. 13,692 (Mar. 14, 1995)

334. **Schuck, Peter H.** When the exception becomes the rule: regulatory equity and the formulation of energy policy through an exceptions process. 1983 ACUS 513, and 1984 DUKE L.J. 163.

Statement 10: "Statement on Agency Use of an Exceptions Process to Formulate Policy." 1 C.F.R. § 310.10 (1988), and 48 FED. REG. 57,464 (Dec. 30, 1983), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989).

335. **Schuck, Peter H., and E. Donald Elliott.** To the *Chevron* station: an empirical study of Federal administrative law. 1990 ACUS 767, and 1990 DUKE L.J. 984. *Also:* Studying administrative law: a methodology for and report on new empirical research. 42 ADMIN. L. REV. 519 (1990).

336. **Schuck, Peter H., and Theodore Hsien Wang.** Continuity and change: patterns of immigration litigation in the courts, 1979-1990. 45 STAN. L. REV. 115 (1992).

337. **Schwartz, Teresa M.** The Consumer Product Safety Commission: a flawed product of the consumer decade. 1982 ACUS 578 (VOL. 2), and 51 GEO. WASH. L. REV. 32 (1982).

338. **Schwartz, Teresa M., and Robert S. Adler.** Product recalls: a remedy in need of repair. 1984 ACUS 135, and 34 CASE W. RES. L. REV. 401 (1983-84).

Recommendation 84-2: "Procedures for Product Recalls." 1 C.F.R. § 305.84-2 (1993) and 49 FED. REG. 29,940 (July 25, 1984).

339. **Schwartz, Warren F.** The administration by the Department of the Treasury of the laws authorizing the imposition of antidumping duties. 3 ACUS 187 (1975).

Recommendation 73-4: "Administration of the Antidumping Law by the Department of the Treasury." 39 FED. REG. 4,846 (Feb. 7, 1974), and 1973-74 ACUS ANN. REP. 36.

340. **Scott, Kenneth E.** The dual banking system: a model of competition in regulation. 30 STAN. L. REV. 1 (1977).

341. **Scott, Kenneth E.** In quest of a reason: the licensing decisions of the Federal banking agencies. 4 ACUS 83 (1979), and 42 U. CHI. L. REV. 235 (1975).

Recommendation 75-1: "Licensing Decisions of the Federal Banking Agencies." 1 C.F.R. § 305.75-1 (1988), 4 ACUS 19 (1975), and 40 FED. REG. 27,925 (July 2, 1975), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

342. **Shane, Peter F.** Negotiating for knowledge: administrative responses to Congressional demands for information. 1990 ACUS 611. *Also:* Administrative responses to Congressional demands for information. 44 ADMIN. L. REV. 197 (1992).

Recommendation 90-7: "Administrative Responses to Congressional Demands for Sensitive Information." 1 C.F.R. § 305.90-7 (1993), and 55 FED. REG. 53,272 (Dec. 28, 1990).

343. **Shannon, Brian D.** Debarment and suspension revisited: Fewer eggs in the basket? 1994-1995 ACUS 305, and 44 CATH. U. L. REV. 363 (1995).

Recommendation 95-2: "Debarment and Suspension From Federal Programs," 60 FED. REG. 13,695 (Mar. 14, 1995).

344. **Shapiro, Sidney A.** Agency review of existing regulations. 1994-1995 ACUS 407.

Recommendation 95-3. "Review of Existing Agency Regulations." 60 FED. REG. 43,109 (Aug. 18, 1995).

345. **Shapiro, Sidney A.** Biotechnology and the design of regulation. 1989 ACUS 475, and 17 ECOLOGY L.Q. 1 (1990).

Recommendation 89-7: "Biotechnology and the Design of Regulation." 1 C.F.R. § 305.89-7.

346. **Shapiro, Sidney A.** The Dormant Noise Control Act and options to abate noise pollution: with a technical appendix on noise and its effects by Alice H. Suter. 1992 ACUS 427.

Recommendation 92-6: "Implementation of the Noise Control Act." 1 C.F.R. § 305.92-6. 1992 ACUS ANN. REP. 86, and 57 FED. REG. 30,110 (July 8, 1992), and 57 FED. REG. 44,791 (Sept. 29, 1992).

347. **Shapiro, Sidney A.** Scientific issues and the function of hearing procedures: an evaluation of FDA's Public Board of Inquiry. 1985 ACUS 795, and 1986 DUKE L.J. 288.

Statement 11: "Statement on Hearing Procedures for the Resolution of Scientific Issues." 1 C.F.R. § 310.11 (1993), and 50 FED. REG. 52,896 (Dec. 27, 1985).

348. **Shaw, William R.** The procedures to ensure compliance by Federal facilities with environmental quality standards. 4 ACUS 283 (1979), and 5 ENVTL. L. REP. 50,211 (1975).

Recommendation 75-4: "Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards." 1 C.F.R. § 305.75-4 (1993), and 40 FED. REG. 27,928 (July 2, 1975).

349. **Shoenberger, Allen E.** State disability services' procedures for determining and redetermining social security claims for the Social Security Administration. 1987 ACUS 579.

Recommendation 87-6: "State-Level Determinations in Social Security Disability Cases." 1 C.F.R. § 305.87-6 (1993), and 52 FED. REG. 49,142 (Dec. 30, 1987).

350. **Singer, Michael Jay.** Freedom of information in the United States. *Published as:* "United States," at 309-356, *in:* Rowat, Donald C., ed. Administrative secrecy in developed countries. New York: Columbia Univ. Pr., 1979.

351. **Smith, Loren A.** Foreword. 18 NEW ENG. L. REV. 777 (1983). [Foreword to the law review's symposium on administrative law].

352. **Smith, Loren A.** Judicial review of administrative decisions. 7 HARV. J. L. & PUB. POL'Y 61 (1984).

353. **Smith, Loren A.** Judicialization: the twilight of administrative law. Commentary. 1985 DUKE L.J. 427.

354. **Smith, Loren A.** A vision of the exchange. 27 WM. & MARY L. REV. 767 (1986). [Discussion at the 7th Anglo-American Exchange, on the theme of "Judicial review of administrative and regulatory action"].

355. **Smith, Stuart A.** Deferred taxation of gains realized upon divestiture of property to avoid conflicts of interest. 1988 ACUS 273, and 36 FED. BAR NEWS & J. 126 (1989).

Recommendation 88-4: "Deferred Taxation for Conflict-of-Interest Divestitures." 1 C.F.R. § 305.88-4 (1992), and 53 FED. REG. 26,029 (July 11, 1988), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992). [Note: This recommendation was implemented by the Ethics Reform Act of 1989, PUB. L. 101-194, 103 STAT. 1716].

356. **Smythe, Marianne K.** The reparations program at the Commodity Futures Trading Commission: reducing formality in agency adjudication. 1988 ACUS 873, and 2 ADMIN. L.J. AM. U. 39 (1988).

Statement 13: "Dispute Resolution Procedure in Reparations and Similar Cases." 1 C.F.R. § 310.13 (1993), and 53 FED. REG. 26, 032 (July 11, 1988).

357. **Sofaer, Abraham D.** The change-of-status adjudication: a case study of the informal agency process. 2 ACUS 303 (1973), and 1 J. LEGAL STUD. 349 (1972). *Also:* Judicial control of informal discretionary adjudication and enforcement. 72 COLUM. L. REV. 1293 (1972).

Recommendation 71-5: "Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications." 2 ACUS 32 (1975), and 1971-72 ACUS ANN. REP. 56.

358. **Spritzer, Ralph S.** Uses of the summary power to suspend rates: an examination of Federal regulatory agency practices. 2 ACUS 765 (1973), and 120 U. PA. L. REV. 39 (1971).

Recommendation 72-4: "Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies." 1 C.F.R. § 305.72-4 (1993).

359. **Stanton, Thomas H.** Administrative and legal aspects of Federal supervision of safety and soundness of government sponsored enterprises. 1991 ACUS 589. *Also:* Federal supervision of safety and soundness of government-sponsored enterprises. 51 PUB. ADMIN. REV. 572 (1991), and 5 ADMIN. L.J. AM. U. 395 (1991).

Recommendation 91-6: "Improving Supervision of Safety and Soundness of Government Sponsored Enterprises." 1 C.F.R. § 305.91-6 (1993), and 54 FED. REG. 33,852 (July 24, 1991).

360. **Steadman, John M.** "Forgive U.S. its trespasses?": Land title disputes with the sovereign: present remedies and prospective reform. 1972 DUKE L.J. 15.

361. **Steinberg, Ann.** Federal grant dispute resolution. 1982 ACUS 137 (Vol. 1), and reprinted at Chapter 54 *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender.

Recommendation 82-2: "Resolving Disputes under Federal Grant Programs." 1 C.F.R. § 305.82-2 (1993), and 47 FED. REG. 30,704 (July 15, 1982).

362. **Stevenson, Russell B., Jr.** Fees under the Freedom of Information Act. 1981 ACUS 85.

Recommendation 81-1: "Procedures for Assessing and Collecting Freedom of Information Act Fees." 1 C.F.R. § 305.81-1 (1988), and 46 FED. REG. 62,805 (Dec. 29, 1981), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989). [Note: This recommendation has been implemented by PUB. L. 99-570 § 1801, 100 STAT. 3207-48, "Freedom of Information Reform Act of 1986"].

363. **Stevenson, Russell B., Jr.** Protecting business secrets under the Freedom of Information Act: managing Exemption 4. 1982 ACUS 81 (Vol. 1), and 34 ADMIN. L. REV. 207 (1982).

Recommendation 82-1: "Exemption (b)(4) of the Freedom of Information Act." 1 C.F.R. § 305.82-1 (1988), and 47 FED. REG. 30,702 (July 15, 1982), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989). [Note: The President in 1987 issued Executive Order 12600, which requires agencies to follow procedures similar to those recommended by ACUS].

364. **Strauss, Peter L.** Disqualification of decisional officials in rulemaking. 1980 ACUS 375, and 80 COLUM. L. REV. 990 (1980).

Recommendation 80-4: "Decisional Officials' Participation in Rulemaking Proceedings." 1 C.F.R. § 305.80-4 (1993), and 45 FED. REG. 46,776 (July 11, 1980).

365. **Strauss, Peter L.** Mining claims on public lands: a study of Interior Department procedures. 3 ACUS 451 (1975), and 1974 UTAH L. REV. 185.

Recommendation 74-3: "Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands." 1 C.F.R. § 305.74-3 (1988), and 3 ACUS 43 (1975), and 39 FED. REG. 23,043 (1974), as amended at 54 FED. REG. 6,861, Feb. 15, 1989).

366. **Sullivan, Neil J.** Independent adjudication and occupational safety and health policy: a test for administrative court theory. 31 ADMIN. L. REV. 177 (1979).

Abridgement of unpublished report: Adjudication by independent agency: the effects of occupational safety and health policy. April 1978.

367. **Szanton, Peter L.**, ed. Federal reorganization: what have we learned? Chatham, N.J.: Chatham House, 1981.

368. **Thomas, Larry W.** The courts and the implementation of the Government in the Sunshine Act. 37 ADMIN. L. REV. 259 (1985).

369. **Thomas, Norman C.** Politics, structure and personnel in administrative regulation. 2 ACUS 267 (1973), and 57 VA. L. REV. 1033 (1971).

Statement 1: "Views of the Administrative Conference on the 'Report on Selected Independent Regulatory Agencies' of the President's Advisory Council on Executive Organization." 57 VA. L. REV. 927 (1971), and 38 FED. REG. 19,794 (July 23, 1973).

370. **Tobias, Carl W.** Rule 11-type sanctions in administrative proceedings. Unpublished draft report, March 1995.

371. **Tomlinson, Edward A.** Discovery in agency adjudication. 1 ACUS 577 (1971), and 1971 DUKE L.J. 89.

Recommendation 70-4 [Originally Recommendation no. 21]: "Discovery in Agency Adjudication." 1 C.F.R. § 305.70-4 (1988), and 38 FED. REG. 19,782 (July 23, 1973), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

372. **Tomlinson, Edward A.** Modification and dissolution of administrative orders and injunctions. 2 ACUS 511 (1973), and 31 MD. L. REV. 312 (1971).

Recommendation 71-8: "Modification and Dissolution of Orders and Injunctions." 1 C.F.R. § 305.71-8 (1993).

373. **Tomlinson, Edward A.** The experience of various agencies with statutory time limits applicable to licensing or clearance functions and to rulemaking. 1978 ACUS 119.

Recommendation 78-3: "Time Limits on Agency Actions." 1 C.F.R. § 305.78-3 (1993), and 43 FED. REG. 27,509 (June 26, 1978).

374. **Tomlinson, Edward A.** Strengthening the informational and notice-giving functions of the Federal Register. 4 ACUS 427 (1979).

Recommendation 76-2: "Strengthening the Informational and Notice-Giving Functions of the Federal Register." 1 C.F.R. § 305.76-2 (1993), and 41 FED. REG. 29,653 (July 19, 1976).

375. **Tomlinson, Edward A.** The use of the Freedom of Information Act (FOIA) for discovery purposes. 1983 ACUS 277, and 43 MD. L. REV. 119 (1984).

Recommendation 83-4: "Use of the FOIA for Discovery Purposes," 1 C.F.R. § 305.83-4 (1993), and 48 FED. REG. 57,463 (Dec. 30, 1983).

376. **Tomlinson, Edward A., and Jerry L. Mashaw.** The enforcement of Federal standards in grant-in-aid programs: suggestions for beneficiary involvement. 2 ACUS 531 (1973), and 58 VA. L. REV. 600 (1972).

Recommendation 71-9: "Enforcement of Standards in Federal Grant-In-Aid Programs." 1 C.F.R. § 305.71-9 (1988)and 38 FED. REG. 19,782 (July 23, 1973), as amended at 54 FED. REG. 6,861 (Feb. 15, 1989).

377. **Vaughns, Katherine L.** Reforming INS work authorization procedures: establishing clearer standards and developing more consistent procedures. Draft report, October 1995.

378. **Verkuil, Paul R.** Congressional limitations on judicial review of rules. 1982 ACUS 443 (Vol. 2), and 57 TUL. L. REV. 733 (1983).

Recommendation 82-7: "Judicial Review of Rules in Enforcement Proceedings." 1 C.F.R. § 305.82-7 (1993), and 47 FED. REG. 58,208 (Dec. 30, 1982).

379. **Verkuil, Paul R.** A critical guide to the Regulatory Flexibility Act. 1981 ACUS 203, and 1982 DUKE L.J. 213.

380. **Verkuil, Paul R.** The emerging concept of administrative procedure. 78 COLUM. L. REV. 258 (1978).

381. **Verkuil, Paul R.** Jawboning administrative agencies: ex parte contacts by the White House. 1980 ACUS 513, and 80 COLUM. L. REV. 943 (1980), and at 464 *in:* U.S. Congress. Senate. Comm. on Governmental Affairs. Regulatory reform legislation of 1981: hearings on S.344 and S.1080. May 12 and June 23, 1982. 97th Cong., 1st Sess. Washington, D.C.: U.S. Gov't Prt. Off., 1982.

Recommendation 80-6: "Intragovernmental Communications in Informal Rulemaking Proceedings," 1 C.F.R. § 305.80-6 (1993), and 45 FED. REG. 86,407 (Dec. 31, 1980).

382. **Verkuil, Paul R.** Judicial review of informal rulemaking. 60 VA. L. REV. 185 (1974).

Recommendation 74-4: "Preenforcement Judicial Review of Rules of General Applicability." 1 C.F.R. § 305.74-4 (1993), and 39 FED. REG. 23,044 (June 26, 1974).

383. **Verkuil, Paul R.** A study of immigration procedures. 1984 ACUS 987, and 31 UCLA L. REV. 1141 (1984).

384. **Verkuil, Paul R.** Study of informal adjudication procedures. 43 U. CHI. L. REV. 739 (1976).

385. **Verkuil, Paul R., Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey S. Lubbers**. The Federal administrative judiciary. 1992 ACUS 773. *Also:* Verkuil, Paul R. Reflections upon the Federal administrative judiciary. 39 UCLA L. REV. 1341 (1992). *An extract of this report also published as:* Lubbers, Jeffrey S. The Federal administrative judiciary: establishing an appropriate system of performance evaluation for ALJs. 7 ADMIN. L.J. AM. U. 589 (1994). *Supra* no. 234.

Recommendation 92-7: "The Federal Administrative Judiciary." 1 C.F.R. § 305.92-7 (1993), and 57 FED. REG. 61,760 (Dec. 29, 1992).

386. **Vetter, Jan.** Affirmative action in faculty employment under Executive Order 11246. 4 ACUS 147 (1979).

Recommendation 75-2: "Affirmative Action for Equal Opportunity in Nonconstruction Employment." 1 C.F.R. § 305.75-2 (1993), and 4 ACUS 21 (1979), and 40 FED. REG. 27,926 (July 2, 1975).

387. **Vining, G. Joseph**. Direct judicial review and the doctrine of ripeness in administrative law. 69 MICH. L. REV. 1443 (1971).

388. **Ware, Leland.** New weapons for an old battle: the enforcement provisions of the 1988 amendments to the Fair Housing Act. 1992 ACUS 147, and 7 ADMIN. L.J. AM. U. 59 (1993).

Recommendation, 92-3: "Enforcement Procedures Under the Fair Housing Act." 1 C.F.R. § 305.92-3 (1993), and 57 FED. REG. 30,104 (July 8, 1992).

389. **Warfield, Wallace.** The implications of alternative dispute resolution processes for decisionmaking in administrative disputes. 16 PEPPERDINE L. REV. S93 (1989).

390. **Weaver, Russell L.** Organization of adjudicative offices in executive departments and agencies. 1993 ACUS 547. *Also:* Management of ALJ offices in executive departments and agencies. 47 ADMIN. L. REV. 303 (1995).

391. **Weiss, Marley.** Federal regulation of U.S. agency employee testimony and document production. Unpublished draft report, October 1995.

392. **Welborn, David M.** Governance of Federal regulatory agencies. Knoxville: Univ. of Tennessee Pr., 1977.

Statement 4: "Strengthening Regulatory Agency Management Through Seminars for Agency Officials." 1 C.F.R. § 310.4 (1993), and 40 FED. REG. 27,928 (July 2, 1975).

393. **Welborn, David M., William Lyons, and Larry Thomas.** Implementation and effects of the Federal Government in the Sunshine Act. 1984 ACUS 197. *Also:* Reprinted without appendices at Appendix 7D *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. *Abridged:* The Federal Government in the Sunshine Act and agency decision making. 20 ADMIN. & SOC'Y 465 (1989).

Recommendation 84-3: "Improvements in the Administration of the Government in the Sunshine Act." 1 C.F.R. § 305.84-3 (1993), and 49 FED. REG. 29,942 (July 25, 1984), as amended at 57 FED. REG. 61,769 (Dec. 29, 1992).

394. **White, Martin B.** Offset dispute procedures under the Debt Collection Act of 1982. 1987 ACUS 939.

Recommendation 87-9: "Dispute Procedures in Federal Debt Collection." 1 C.F.R. § 305.87-9 (1993), and 52 FED. REG. 49,146 (Dec. 30, 1987).

395. **Williams, Jerre S.** Fifty years of the law of the Federal administrative agencies and beyond. 29 FED. BAR J. 267 (1970).

396. **Williams, Stephen F.** "Hybrid rulemaking" under the Administrative Procedure Act: a legal and empirical analysis. 4 ACUS 499 (1979), and 42 U. CHI. L. REV. 401 (1975).

Recommendation 76-3: "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking." 1 C.F.R. § 305.76-3 (1993), and 41 FED. REG. 29,654 (July 19,1976).

397. **Willrich, Mason.** Administration of energy shortages: natural gas and petroleum. Cambridge, MA: Ballinger Pub. Co., 1976.

398. **Wozencraft, Frank M.** The Administrative Conference of the United States. 24 BUS. L. 915 (1969).

399. **Wright, Ronald F.** The right to counsel during agency investigations. 1993 ACUS 509.

Statement 16: "Right to Consult with Agency Counsel in Agency Investigations." 59 FED. REG. 4,677 (Feb. 1, 1994).

400. **Yaffee, Steven L., and Julia M. Wondolleck.** Negotiating survival: an assessment of the potential use of alternative dispute resolution techniques for resolving conflicts between endangered species and development. Unpublished report, September 1994.

401. **Zengerle, Lynda S.** Procedural deficiencies in labor certification of immigrant aliens. 3 ACUS 129 (1975).

Recommendation 73-2: "Labor Certification of Immigrant Aliens." 3 ACUS 19 (1975), and 38 FED. REG. 16,840 (June 27, 1973).

402. **Zimmer, Michael J., and Charles A. Sullivan.** Consent decree settlements: optimizing public and private interests in antitrust and employment discrimination settlement proceedings. 1976 DUKE L.J. 163.

PUBLISHED TRANSCRIPTS OF MEETINGS Arranged by date

ACUS 7th plenary session. June 8-9, 1982. *Transcript:* Berg, Richard K. Administrative Conference of the United States: report on the seventh Plenary session. 25 ADMIN. L. REV. 61 (1973). *Supra* no. 58.

ACUS Colloquium on Regulatory Design in Theory and Practice. 1982-1985. *Supra* no. 6.

ACUS 27th Plenary session. December 15, 1983. Legislative veto of agency rules after *INS v. Chadha:* Twenty-Seventh Plenary Session discussion on December 15, 1983. *Supra* no. 19.

403. **ABA-ACUS symposium on Federal disability benefit programs. October 11-12, 1985.** Symposium: Federal disability benefit programs: report and recommendations. Washington, D.C.: American Bar Association, 1985. [Symposium cosponsored by ACUS, ABA, ABA Administrative Law Section, ABA Commission on Legal Problems of the Elderly, Case Western Reserve School of Law, and the Cleveland Foundation]

404. **ABA-ACUS symposium on Federal disability benefit programs. October 11-12, 1985.** Briefing memorandum. Prepared by Jerry L. Mashaw. [Symposium cosponsored by ACUS, ABA, Case Western Reserve School of Law, and the Cleveland Foundation]. Washington, D.C.: American Bar Association, 1985.

405. **The role of legislative history in judicial interpretation. February 24, 1987.** ACUS colloquy series. *Transcript:* Conference on statutory interpretation: the role of legislative history in judicial interpretation: a discussion between Judge Kenneth W. Starr and Judge Abner J. Mikva. 1987 DUKE L.J. 362.

406. **Administrative Conference of the U.S. (Office of the Chairman). June 1, 1987.** Improving dispute resolution: options for the Federal government. 1 ADMIN. L.J. AM. U. 399 (1987).

407. **ABA-ACUS Medicare procedures symposium. October 16-17, 1987.** Report and recommendations. [Co-sponsored by ABA Commission on Legal Problems of the Elderly and ACUS. Held October 16-17, 1987, in Leesburg, VA].

408. **Broadcast deregulation: the Reagan years and beyond. November 4, 1987.** ACUS Colloquy series. *Transcript:* 40 ADMIN. L. REV. 345 (1988).

409. **Ethics in government: proceedings of a working conference. March 1, 1988.** *In:* Administrative Conference of the U.S. (Office of the Chairman). Sourcebook on government ethics for Presidential appointees. *Supra* no. 29 *Partial contents:* G. Calvin Mackenzie. Presidential transitions and the Ethics in Government Act of 1978 Issues and options paper prepared for the...; Deanne C. Siemer. Enforcement of Federal ethics laws as applied to Executive Branch personnel. Issues and options paper prepared for the....

Federal user fees. May 3, 1988. Proceedings. [A symposium sponsored by ACUS held at the National Press Club, Washington, D.C.]. *Supra* no. 12.

410. **The U.S., Canada, and Free Trade: New Frontiers in Dispute Resolution. February 10, 1989.** [ACUS-sponsored seminar held in Washington, D.C.]. *Published as:* Summary of proceedings of the seminar on dispute resolution under the Canada-United States Free Trade Agreement. 26 STAN. J. INT'L L. 153 (1990).

Federal agency use of ADR: a roundtable for general counsels. January 23, 1990. [Sponsored by ACUS, held at United States Courthouse Arlington, VA]. *Supra* no. 11.

411. **Providing economic incentives in environmental regulations. April 23, 1990.** ACUS colloquy series. *Transcript:* Providing economic incentives in environmental regulation. 8 YALE J. ON REG. 463 (1991). [Speakers: E. Donald Elliott, David G. Hawkins, Richard B. Stewart].

412. **Globalization of securities and financial market regulation in the 1990s. June 14, 1990.** ACUS colloquy series. *Transcript:* 10 ANN. REV. BANKING L. 345 (1991).

413. **ACUS 42d plenary session. December 19, 1990.** Transcript: Forty-second session of the Administrative Conference of the U.S. 53 U. PITT. L. REV. 857-882 (1992). [Discussion about the past and future activities of the Conference].

414. **The Supreme Court's administrative law docket. September 19, 1991.** ACUS colloquy series. *Transcript:* The Supreme Court's law docket. 6 ADMIN. L.J. AM. U. 261 (1992).

Roundtable on Reg-neg. Oct. 3, 1991. *Supra* no. 310.

415. **An administrative alternative to tort litigation: the asbestos claims crisis. October 31, 1991.** ACUS colloquy series. *Transcript:* An administrative alternative to tort litigation to resolve asbestos claims. 13 CARDOZO L. REV. 1817 (1992). *Also*: I.e., Brickman, Lester, An administrative alternative to tort litigation to resolve asbestos claims. Unpublished paper, October 1991.

416. **The Supreme Court's administrative law docket. September 24, 1992.** ACUS colloquy series. *Transcript:* The Supreme Court's 1991-92 administrative law docket: proceedings from the Administrative Conference of the United States. 7 ADMIN. L.J. AM. U. 237 (1993). *Partial contents:* Patricia M. Wald. The cinematic Supreme Court: 1991-92 term. 7 ADMIN. L.J. AM. U. 238 (1993); Marshall J. Breger. Administrative law and labor law: the Supreme Court's 1991-92 docket. 7 ADMIN. L.J. AM. U. 257 (1993);. Thomas O. Sargentich. The Supreme Court's administrative law jurisprudence. 7 ADMIN. L.J. AM. U. 273 (1993).

417. **Administrative law issues and the 103d Congress: basic principles and new strategies for cooperation. January 11, 1993.** Sixth annual seminar for Congressional staff. Washington, DC: ACUS, 1993.

418. **Managing economic interdependence. January 29, 1993.** Use of U.S. antitrust law abroad is debated by panel at joint symposium. ANTITRUST & TRADE REG. REP., Feb. 4, 1993, at 123. [An ACUS-cosponsored symposium entitled, "Managing Economic Interdependence"].

Inspectors general: an institution in need of reform? March 3, 1993. ACUS Colloquy series. *Supra* no. 17.

419. **Administrative law issues in health care reform. May 9, 1994.** Seventh annual seminar for Congressional staff, May 9, 1994. Washington, D.C., ACUS, 1994. *Partial contents:* Sallyanne Payton. Federal jurisdictional and administrative law implications of national health care reform; Eleanor D. Kinney. Rule and policy making under health reform; Timothy S. Jost. Administrative adjudication issues in health reform. Expanded and edited papers, 47 ADMIN. L. REV. (forthcoming 1995).

420. **The ADR breakthrough for government contract disputes. June 8, 1995.** Practitioner's desk book. The Administrative Conference of the United States and CPR Institute for Dispute Resolution.

421. **Innovative approaches to workplace disputes. June 16, 1995.** Transcript of plenary session forum, 52nd plenary. Forthcoming, ADMIN. L.J. AM. U., Vol. 9, no. 4 (1996). *Also:* Videotape.

SUBJECT INDEX

A

Accountability, 98, 257
Adjudication
  Appeals, 104, 107, 163, 205
    See also Civil money penalties
  Discovery, 371, 375
  Evidence, 301
  Generally, 10, 80, 168, 167, 236, 239, 251, 306
  Housing, 388
  Immigration. *See* Immigration
  Informal, 36, 111, 159, 228, 380, 356, 384, 359
    See also Alternative dispute resolution
  Mass justice, 260, 289, 302
  Medicare, 68, 200
  Model rules, 22
  Participation, 122, 161
  Separation of functions, 51, 53, 148, 269, 366
  Settlement, 3, 5, 65, 80, 4, 199, 201, 209, 282, 402
  Simplified proceedings, 282
  Siting, 116
  Social Security, 70, 71, 140, 141, 149, 258, 261, 349
  Subpoena, 63
  Summary action, 164
  Whistleblower cases, 152
Administrative Conference of the U.S. (ACUS)
  CIRA, 112
  Colloquia, 18, 405, 408, 411, 412, 414, 379, 416
  Generally, 1, 4, 34, 39, 89, 142, 144, 158, 176, 203, 269, 303
  Guides, 16, 32
  History, 85, 395, 398, 413
  Model rules, 23, 24
  Plenary sessions, 58, 413
  Roundtables, 12, 310, 406
  Seminars, 417, 383
  Sourcebooks, 11, 26, 28, 29
  Symposia, 13, 403, 404, 407, 418
  Videotape, 14
Administrative court, 285, 366
  See also Specialized courts
Administrative delay. *See* Delay
Administrative inspections, 214
Administrative law, 90, 92, 98, 231, 277, 351, 353, 416, 417
  Book review, 93
  British, 1, 2, 354
  Sourcebook, 11
  State, 113, 206, 309, 349
Administrative law judges
  Caseload statistics, 10, 181, 236
  Discipline, 325, 385
  Evaluation, 234, 385
  Federal ALJ corps, 242
  Generally, 121, 176, 235, 239, 324, 385
  Hearing facilities, 8, 293
  Loan program, 361
  Manual, 20
  Non-ALJs, 155, 385
  Organization, 390
  Review, 107
  Selection, 294, 385
  State central panel system, 225, 316
Administrative Procedure Act (APA)
  Agency advice, 47, 308
  Declaratory orders, 307
  Exemptions, 72, 73, 198, 243
  Generally, 4, 86, 87, 88, 156
  Informal rules, 79
  Interpretive rules. *See* Rulemaking, Interpretive
  Right to counsel, 399
  Rulemaking, 396
  Separation of functions, 51
  Sourcebook, 11

Administrative proceedings
  Public participation, 122
Adverse actions. *See* Federal employees, Personnel disputes
Adverse publicity, 160
Advice, Governmental, 47, 308
Advisory committees, 59, 105
Affirmative action, 386
Agency policy statements. *See* Policy statements
Agency reorganization. *See* Reorganization
Agricultural Credit Act, 318
Aliens, 289, 323, 357, 401. *See also* Immigration
Alternative dispute resolution
  ACUS guide, 30
  ACUS Roundtables, 12, 310, 406
  ADA, 191
  ADR Act, 16, 91, 97, 175
  Arbitration, 3, 5, 97, 100
  Claims, 61
  Complex cases, 80
  Contract disputes, 56, 91, 128, 187
  Evaluating, 32, 33, 131, 315
  FOIA disputes, 177
  Generally, 28, 97, 103, 187, 304, 317, 389
  Grant disputes, 361
  Information disputes, 342
  International disputes, 230
  Mediator confidentiality, 178, 186
  Negotiated rulemaking. *See* Negotiated rulemaking
  Negotiation, 41, 311
  Neutrals, 19, 328
  Ombudsmen, 27, 40
  Reparations, 356
  Settlement judges, 199, 282
  Superfund, 41
  Videotape, 14
American Bar Association, 4, 39, 403, 404
Americans with Disabilities Act, 191
Antidumping. *See* International trade
Antitrust, 137, 402, 418
Appeals. *See* Adjudication, Appeals
Appointees. *See* Presidential appointees
Arbitration, 3, 5, 97, 100
Archives, 299
Ash Council report, 285, 322, 369, 395
Asylum, 254
Atomic Energy Commission (AEC), 116
Attorneys
  Discipline, 114
  Fees, 212, 231, 320
  Nonlawyer assistance, 193
  Private, 244, 327
  Pro bono representation, 95, 221
Aviation industry. *See* Federal Aviation Administration (FAA)

B

Bank Holding Company Act, 36
Bank regulation, 54, 55, 248, 251, 252, 340, 341, 412
  FOIA, 333
Benefits, Disability. *See* Disability benefits
Benefits, State, 169
Bid protests, 210
Biotechnology, 345
Book reviews, 93, 136, 240, 305
Breyer, Stephen, 238
British administrative law, 1, 2, 354
Broadcast licensing, 43, 408
Broadcasting of proceedings, 57
Bumpers Amendment, 224
Business information
  See
    Information, Business
    Trade secrets

C

California. *See* State administrative law
Canada-U.S. Free Trade Agreement, 230

Carcinogens, 272
Case management, 104, 239, 306
Case Western Reserve School of Law, 403, 404
Caseload accounting, 10
Center of State Administrative Law, 113
Central panel system, 225, 316
CERCLA. *See* Superfund
Chevron USA v. NRDC, 143, 335, 378
Citizen complaints, 326
Citizen suits, 84, 125, 259
Civil Aeronautics Board (CAB), 60, 146
Civil money penalties, 48, 132, 139, 148, 156, 167, 172, 295
Claims, 54, 61, 167, 258, 365, 379
Clean Air Act, 129, 411
Cleveland Foundation, 403, 404
Collective bargaining, 179
Committees, Advisory. *See* Advisory committees
Commodity Futures Trading Commission (CFTC), 356
Communication, Risk. *See* Risk communication
Communications, Ex parte. *See* Ex parte communications
Compensation
  Vaccine injury, 253
Complaint procedures, 326
Confidentiality, 45, 132, 178, 186
Conflict of interest
  Advisory committees, 59
  Disqualification, 59, 109
  Divestiture, 355
  Financial disclosure, 279
  Former officials, 278
  Generally, 145
  Rulemaking, 364
  Transition team, 188
  Trusts, 109
Congressional oversight, 226, 227, 342, 378
  See also Legislative veto
Consent decrees, 201, 402
Consular officers, 284
Consumer Product Safety Commission (CPSC), 272, 331, 337, 338
Contract Disputes Act, 56, 249
Contractors, 173, 244, 343
Contracts
  Bid protests, 210
  Debarment, 343
  Disputes, 56, 128, 174, 210, 249
  Indemnification, 173
  Renegotiation Board, 46
  Rulemaking, 73
Cooperation, 66, 183, 276
Coordination of Federal programs, 255
Cost-benefit analysis
  Environmental, 52, 134
  Human life, 170
  Preclusion, 288
  Rulemaking, 266
Council on Tribunals, 1, 2
Countervailing duties. *See* International trade
Courts, 90, 103
Criminal prosecution, 314
Customs Service, 165, 195

D

Debarment of contractors, 343
Debt collection, 220, 394
Declaratory orders, 307, 308
Deference to agencies, 143, 378
  See also
    Chevron USA v. NRDC
    Statutory interpretation
Deferred taxation, 355
Delay, 10, 115, 308, 306, 323, 373
Department of Agriculture, 180, 318, 321
Department of Commerce, 151, 195
Department of Energy (DOE), 37
Department of Health and Human Services (HHS), 104, 207
Department of Housing and Urban Development (HUD), 388

Department of Justice, 137, 167, 201, 247, 314, 342, 402
Department of Labor, 126, 134, 401
Department of State, 284
Department of the Interior, 110, 365
Department of the Treasury, 339
Department of Transportation, 31, 60
Deregulation, 60, 322, 408. *See also* Regulation
Direct final rulemaking, 223
Disability benefits
  Appeals, 70, 208
  Book reviews, 305
  Management of, 258
  Mass justice, 140, 141, 302
  Medical decisionmaking, 71
  Representative payees, 149
  State determination, 349
  Symposium, 403, 404, 407
Disability benefits claims. *See* Social Security Administration (SSA)
Disclosure
  Congressional demands, 342
  Financial, 59, 279, 355
Discovery, 371, 375
Discretion, Prosecutorial. *See* Prosecutorial discretion
Discretionary review, 146, 153
Dispute resolution. *See* Alternative dispute resolution
Disqualification, 59, 109, 364
Divestiture, 213, 355
Dole v. United Steelworkers, 143

E

Economic analysis, 137
Education. *See* Training
Electronic information, 297-299
Employees, Federal. *See* Federal employees
Energy policy
  Generally, 312
  Price regulation, 37
  Regulation, 334
  Shortages, 292, 397
Enforcement, 75.
    See also
      Citizen suits
      Civil money penalties
      Split enforcement model
  Environmental law, 348
  Housing, 388
  Judicial review, 378
  Self-enforcement, 275
Environmental law
  Asbestos claims, 379
  Citizen suits, 84, 125
  Cost-benefit analysis, 52
  Decisionmaking, 313
  Federal facilities, 348
  Judicial review, 118, 190
  Licensing, 283
  Negotiated rulemaking, 204, 311-312
  NEPA, 123, 124
  Regulation, 411
  Risk communication, 53
  Superfund, 41, 190, 209
Environmental Protection Agency (EPA), 41, 53, 84, 129, 192, 204, 209, 348, 379
Equal Access to Justice Act (EAJA), 212, 320
  Model rules, 24
Equal Employment Opportunity Commission (EEOC), 386, 402
Equity, Regulatory, 334
Ethics
    See also Conflict of interest
  Advisory committees, 59
  Divestiture, 355
  Financial disclosure, 279
  Former officials, 278
  Generally, 145, 327, 409
  Transition team, 29, 188, 319
Ex parte communications, 15, 77, 286, 381
Executive Order 11246, 386
Executive Order 12044, 237

Exemptions
  See
    Freedom of Information Act (FOIA), Exemptions
    Rulemaking, Exemptions
Exhaustion of remedies, 387
Export Administration Act, 151
Export controls, 151

F

Fair Housing Act, 388
Farmer-Lender mediation, 318
Farmers Home Administration, 318
Federal advisory committees. *See* Advisory committees
Federal Aviation Act, 295
Federal Aviation Administration (FAA), 31, 66, 148, 202, 295
Federal Communications Commission (FCC), 43, 141, 329, 408
Federal Debt Collection Act, 220
Federal Deposit Insurance Corporation (FDIC), 248, 340, 341
Federal employees
  Liability, 211, 250
  Personnel disputes, 3, 27, 31, 245, 273
  Retirement, 101
Federal Home Loan Bank Board (FHLBB), 54
Federal Insurance Administration, 313
Federal Mediation and Conciliation Service (FMCS), 14, 31
Federal Power Commission (FPC), 292, 397
Federal Register, 374
Federal Reserve System, 36, 340, 341
Federal rules of evidence, 301
Federal Savings and Loan Insurance Corporation (FSLIC), 54
Federal Tort Claims Act, 65, 108
Federal Trade Commission (FTC), 81, 82, 83, 137
Federal Water Pollution Control Act, 118
Federal-State relations, 169, 207, 225, 256, 290, 292, 300, 310, 376
  Regulation, 379
Fee waivers, 76, 362
Fees. *See* User fees
FIFRA, 192
Financial disclosure. *See* Disclosure, Financial
Financial services regulation, 251, 252, 359
  See also Bank regulation
Flood insurance program, 313
Food and Drug Administration (FDA), 53, 184, 272, 338, 347
Foreign affairs exemption (APA), 72
Forest Service, 321
Forfeiture, 167, 218
Forum shopping, 96, 130, 210, 264
Freedom of Information Act (FOIA)
  Agency adjudication, 168
  Business information, 291, 363
  Discovery, 375
  Disputes, 177
  Electronic information, 297-299
  Exemptions, 333
  Fee waivers, 76, 362
  Generally, 178, 350
  Procedures, 166

G

Government contracts. *See* Contracts
Government employees. *See* Federal employees
Government finance, 78
Government in the Sunshine Act, 35, 64, 368, 393
Government lawyers. *See* Attorneys
Government liability. *See* Liability
Government officials, 59, 188, 278, 279
Government sponsored enterprises, 359
Governmental advice, 47, 281

Grants
  Debarment, 343
  Disputes, 104, 361
  Drafting statutes, 9, 263
  Formula grants, 247
  Generally, 262
  Peer review, 265
  Procedures, 215
  Rulemaking, 73
  Standards, 169, 376
Grievances, 222. *See also* Federal employees

H

Hazardous waste, 41, 209
Health and safety
    See also Mental health
  Auto safety, 240
  Benzene, 134
  Carcinogens, 272
  Cost-benefit analysis, 52
  Enforcement, 196
  Injury claims, 253
  Migrant workers, 255
  NLRB, 179
  OSHA, 267
  OSHRC, 282
  Product safety, 331
  Risk communication, 53
  Risk regulation, 241
Health and safety (Cont'd)
  Standards, 183
  Whistleblowers, 152
Health Care Financing Administration (HCFA), 207
Health care reform, 407, 383
Hearing examiners. *See* Administrative law judges
Hearings, 80, 116, 155, 269, 355
  Caseload accounting, 181
  Duplicative, 202
  Facilities, 8, 293
  Statistics, 10
Housing enforcement, 388
Human life, Valuation, 170
Hybrid rulemaking. *See* Rulemaking, Hybrid

I

Immigration
  Adjudication, 216, 254
  Asylum, 254
  Change of status, 357
  Labor certification, 377, 401
  Legalization, 289
  Litigation, 336
  Mass justice, 289
  Procedures, 383
  Reform, 219, 323
  Research agenda, 217
  Visa denials, 284
Immigration and Naturalization Service (INS), 289, 323, 357, 377, 401
INS v. Chadha, 20, 162, 227
Immunity, 250
Indemnification of contractors, 173
Independent agencies, 393
Industrial development, 290
Informal adjudication. *See* Adjudication, Informal
Informal rulemaking. *See* Rulemaking, Informal
Information
    See also Risk communication
  Business, 291, 363
  Electronic, 297, 299
  FOIA, 166, 168
  Governmental advice, 47
  Public, 45, 50, 374
  Sensitive, 342
  Sunshine Act, 35, 64, 393
Injunctions, 372
Injury claims, 253
Inspections, 214
Inspectors general, 17
Interim final rulemaking, 49
Interlocutory appeals, 163

Internal Revenue Service (IRS), 48, 132, 270
International cooperation, 66
International trade
  Antitrust, 418
  Customs Service, 165
  Disputes, 45, 230
  Trade regulation, 150, 151, 195, 339
International Trade Commission (ITC), 45, 150, 195
Interpretation, Statutory, 44
Interpretive rulemaking. *See* Rulemaking, Interpretive
Intragovernmental communication, 77, 417
Investigation, 399

J

Judges, Settlement. *See* Settlement judges
Judicial review, 55, 118, 130, 132, 190, 210, 366
  Customs Service, 165
  Enforcement, 378
  Environmental law, 118
  Export administration, 151
  Foreign Trade Zones Board, 150
  Generally, 92, 352, 387
  Immigration, 336
  Jurisdiction, 77, 118, 329
  Nonacquiesence, 147
  Preenforcement, 382
  Ripeness, 387
  Rulemaking, 15, 133, 382
  Selective Service decisions, 69
  Separation of functions, 378
  Specialized courts, 103
  Statistics, 306
  Statutory interpretation, 44, 143, 224, 405
  Venue, 130, 264, 332
Jurisdiction, 77, 329
Jurisdictional amount, 118

L

Labor certification, 401
Land management
  Flood Insurance program, 313
  Forest Service, 321
  Leasing, 109, 101
  Mining claims, 365
  Sovereign immunity, 360
Lawyers. *See* Attorneys
Legal education, 294
Legislative drafting, 9, 263
Legislative history. *See* Statutory interpretation
Legislative veto, 20, 162, 226, 227
Liability, 211, 250
Licensing, 373
  Broadcast, 43, 408
  NEPA, 283
  Time limits, 373

M

Magnuson-Moss Act, 81, 82, 83
Management, 247, 367, 392
Mass justice, 193, 260, 289, 302
Mediation, 22, 31, 140, 191, 318
  See also Alternative dispute resolution
Mediator confidentiality, 178, 186
Medicaid, 207
Medical testimony, 71
Medicare
  Adjudication, 68, 200
  Appeals, 205
  Coverage determination, 206
  Symposium, 407
Mental health, 99
Merit Systems Protection Board (MSPB), 3
Migrant farmworkers, 255
Military affairs exemption (APA), 72
Mining claims, 365

N

National Environmental Policy Act (NEPA), 123, 124, 283
National Highway Traffic Safety Administration, 308
National Labor Relations Board (NLRB), 147, 179
National Peformance Review (NPR), 17, 233
National Transportation Safety Board (NTSB), 148, 202, 295
Native American lands, 110, 111
Negotiated rulemaking
  Generally, 6, 204, 310-312
  Neutrals, 328
  Procedures, 185, 296
  Sourcebook, 26
Negotiation. *See* Alternative dispute resolution
Neutrals, 19, 328
No-action letters, 229
Noise Control Act, 346
Nonacquiescence, 147
Notice-and-comment, 243, 374
Nuclear power plant site hearings, 116

O

Occupational Safety and Health Administration (OSHA), 53, 134, 196, 267, 268
Occupational Safety and Health Review Commission (OSHRC)
  Settlement judges, 282
Office of Management and Budget (OMB), 102, 145, 170
Ombudsmen, 27, 40, 99, 117, 177, 326
Orders, 372
  See also
    Adjudication
    Declaratory orders
    Protective orders
Oversight
  See
    Congressional oversight
    Rulemaking, Presidential oversight

P

Paperwork Reduction Act, 157
Parole Board procedures, 197
Participation. *See* Public participation
Parties defendant, 119
Peer review, 200, 265
Penalties. *See* Civil money penalties
Personnel disputes, Federal employees. *See* Federal employees
Pesticides, 192
Petitions. *See* Rulemaking, Petitions
Petroleum regulation, 37, 397
Policy statements, 42, 50, 75, 111, 138
Poor people's counsel, 74
Preemption, 271, 300
Presidential appointees, 101
  See also Ethics, Transition team
Presidential oversight. *See* Rulemaking, Presidential oversight
Presidential transition team, 29, 188, 319
Prison procedures, 197, 222
Private attorneys, 244, 327
Pro bono representation, 95, 221
Product recalls, 338
Prosecution, Criminal. *See* Criminal prosecution
Prosecutorial discretion, 314
Protective orders, 45
Public information. *See* Information
Public lands
  Mining claims, 365
Public participation, 50, 161, 264
  Funding, 81, 82, 74
  Generally, 122, 161
  Interpretive rules, 75
  Rulemaking, 73, 74, 81, 82, 83
Sunshine Act, 35, 64, 368

Publicity, Adverse, 160

R

Race to the courthouse, 96, 264
Ratemaking, 358
  Delay, 281
Recalls, 338
Receiverships, 54
Regulation
    See also
      Bank regulation
      Financial services regulation
      Regulatory reform
  Auto safety, 240
  Biotechnology, 345
  CPSC, 272, 331, 337
  FDA, 272
  International cooperation, 66
  Noise control, 346
  Pesticides, 192
  Petroleum, 37, 397
  Preemption, 271, 300
  Self-regulation, 274, 275
Regulatory agencies, 7
  Ash Council report, 322, 369, 395
  Management, 392
  Organization, 25, 112, 285, 322
  Ratemaking, 358
  Risk communication, 53
Regulatory budget, 280
Regulatory equity, 334
Regulatory Flexibility Act, 379
Regulatory reform, 79, 136, 271, 274, 275,
  Exceptions, 334
  Generally, 7, 86, 87, 92, 189
  NPR, 233
  OSHA, 267
  Regulatory analysis, 266, 379
  Regulatory budget, 280
  Risk regulation, 241
  Rules of general applicability, 182
Remedies, 387
Renegotiation Board, 46
Reorganization, 25, 285, 367
  Dept. of Transportation, 60
  Regulatory agencies, 112, 322, 369, 395
Reparations, 356
Representation, 302
  At investigations, 399
  Nonlawyer, 193
  Poor people's counsel, 74
  Pro bono, 95, 221
Representative payees, 149
Retirement, 101
Review boards, 107, 146, 153, 208, 196
Right to counsel, 399
Ripeness, 387, 378
Risk communication, 53
Risk regulation, 52, 241, 249
Rulemaking
  ACUS Guide, 15
  Agency policy statements, 138
  Choices, 138, 232
  Cost-benefit analysis, 266
  CPSC, 337
  Decisional officials, 364
  Direct final, 223
  Ex parte communications, 286, 381
  Exemptions, 72, 73, 198, 243
  FDA, 184
  Formal, 63, 184
  Generally, 62, 89, 257
  Hybrid, 81, 73, 83, 396
  Informal, 79, 111, 135, 286, 382
  Interim final, 49
  Interpretive, 42, 50, 75
  Judicial review of, 133, 378, 382
  Legislative veto, 20, 162, 226, 227
  Medicaid, 207
  NLRB, 179
  Nongovernmental standards, 183
  OSHA, 267, 268
  Petitions, 246
  Presidential oversight, 102, 145, 237, 309, 381
  Public participation, 74
  Regulatory analysis, 266, 379

  Rules of general applicability, 182
  Time limits, 373
Rulemaking, Negotiated. *See* Negotiated rulemaking
Rules of evidence. *See* Federal rules of evidence
Rules, Interpretive. *See* Rulemaking, Interpretive

S

Sanctions, 370
  Medicare, 200
Scientific decisionmaking, 80, 106, 253, 313, 345, 347
Searches, 214
Securities and Exchange Commission (SEC), 229
Securities regulation, 412
Seizure, 214
Selective Service System, 69
Sensitive information, 342
Separation of functions. *See* Adjudication, Separation of functions
Settlement. *See* Adjudication, Settlement
Settlement judges, 199, 282
Siting, 116, 290
Small businesses, 291, 379
Social Security Administration (SSA)
  Appeals, 70, 205, 208, 261
  Book reviews, 305
  Disability, 71, 140, 141, 258, 349
  Disability symposium, 403, 404
  Federal-State relations, 256, 349
  Medicare. *See* Medicare
  Nonacquiescence, 147
  Representative payees, 149
Sovereign immunity, 120, 250, 360
Specialized courts, 103
Split enforcement model, 143, 148, 196, 257, 269, 335
State administrative law, 113, 206, 309, 316, 318
State-Federal relations. *See* Federal-State relations
Statistics, 10, 335
Statutory interpretation, 44, 143, 224, 405, 378
Subpoena power, 63
Summary judgment, 164
Summary procedure, 154, 358
Sunshine Act. *See* Government in the Sunshine Act
Superfund, 41, 191, 209
Supplemental Security Income Program, 256
Supreme Court, 238, 414, 416

T

Taxation, 132, 270
  Deferred, 355
  Federal, 48
TRAC v. FCC, 329
Testimony, Medical, 71
Thrifts. *See* Bank regulation
Time limits, 306, 373
Torts, 65, 108, 211, 250, 379
Trade regulation, 82, 83, 137
Trade secrets, 45, 291, 363
Trade, International. *See* International trade
Training, 294, 392
Transition team. *See* Presidential transition team
Transportation, 60, 148, 202

U

User fees, 13, 78, 171

V

Vaccine injury compensation, 253
Valuation, Human life, 170
Venue, 96, 130, 264
Veto. *See* Legislative veto
Visa denials, 284

W

Waivers and exceptions, 334
Wald, Patricia M., 231
Whistleblowers, 152

AUTHOR INDEX

Ablard, Charles D., 1-2
Adams, Arvil V., 3
Adler, Robert S., 338
Allard, Nicholas, 250
Altschuler, David M., 247
Aman, Alfred C., Jr., 36-37
Anderson, David R., 27, 40
Anderson, Frederick R., 41
Anthony, Robert A., 42-45
Aronowitz, Dennis S., 46
Asimow, Michael, 47-51
Baram, Michael S., 52-53
Baxter, Lawrence G., 54-55
Bednar, Richard J., 56
Bell, Michael E., 247
Bennett, Robert W., 57
Berg, Richard K., 58-64, 123-124
Bermann, George A., 65-67
Bernard, Phyllis E., 68
Beytagh, Francis X., Jr., 69
Bloch, Frank S., 70-71
Bonfield, Arthur E., 72-75
Bonine, John E., 76
Botein, Michael, 77
Bowers, Michael W., 78-79, 145
Boyer, Barry B., 80-84, 125
Breger, Marshall J., 85-98, 416
Brickman, Lester 415
Broderick, Albert, 99
Brucar, Wayne E., 316
Bruff, Harold H., 100-103, 162
Byrne, James E., 45
Cappalli, Richard B., 104
Cardozo, Michael H., 105
Carrow, Milton M., 106
Cartwright, Bliss C., 83
Cass, Ronald A., 107-108
Chambers, Reid P., 109, 101
Clagett, Brice McAdoo, 111
Colosi, Christopher B., 21
Colosi, Thomas R., 21
Cox, Michael P., 23, 113-114
Cramton, Roger C., 116-125
Croley, Stephen P., 126-127
Crowell, Eldon, H., 128
Currie, David P., 129-130
Dalton, Deborah S., 26
Daniel, Johnnie, 131
Davenport, Charles, 132
Davey, William J., 195
Davis, Frederick, 133
DeLong, James V., 134-137
Diver, Colin S., 138-139
Dixon, Robert G., Jr., 140-141
Dorminey, Elizabeth K., 317
Eads, George C., 189
Edles, Gary J., 142-145, 176
Elliott, E. Donald, 335, 411
Ellis, Emory N., Jr., 146
Estreicher, Samuel, 147
Fallon, Richard H., Jr., 148
Farrell, Margaret G., 149
Fenton, Howard E., III, 150
Fenton, Howard N., 151
Fidell, Eugene R., 152
Figueroa, Jose R., 3
Fowler, Mary Candace, 320
Freedman, James O., 153-154
Frye, John H., 155
Funk, William F., 156-157
Gardner, Warner W., 158, 159
Gellhorn, Ernest, 160-164
Gerhart, Peter M., 165
Giannella, Donald A., 166
Gifford, Daniel, 385
Gifford, Daniel J., 167
Gilbert, Michelle L., 199
Gilhooley, Margaret, 168, 169
Gillette, Clayton, P., 170-171
Goldschmid, Harvey J., 172
Goodman, Frank I., 130, 331
Grad, Frank P., 173
Graham, Heather G., 174
Grassley, Sen. Charles E., 175
Griffin, Brian C., 176
Grunewald, Mark H., 177-179
Grunschlag, Dov M., 180

Halloran, Norbert A., 181
Hamilton, Robert W., 182-184
Harter, Philip J., 185-189
Hawkins, David G., 411
Healy, Michael P., 190
Heifetz, Alan W., 203
Hill, Larry B., 27
Hodges, Ann C., 191
Hopkins, Thomas D., 13, 170-171
Hornstein, Donald T., 192
Hostetler, Zona Fairbanks, 193
Iannelli, Carole D., 214
Jackson, John H., 195
Johnson, George Robert, Jr., 196
Johnson, Phillip E., 197
Jones, Charlotte, 306
Jordan, Ellen R., 198
Joseph, Daniel, 199
Jost, Timothy Stoltzfus, 200-201, 419
Kartalia, David E., 202
Katzen, Sally, 203
Kerwin, Cornelius, 204
Kinney, Eleanor D., 205-207, 419
Klitzman, Stephen H., 64
Koch, Charles, 385
Koch, Charles H., Jr., 208
Koplow, David A., 208
Kornhauser, Lewis A., 209
Kovacic, William E., 210
Kratzke, William P., 211
Krent, Harold J., 212-213
Kress, Jack M., 214
Kurzman, Stephen, 215
Langbein, Laura, 204
Larsen, Paul B., 163
Legomsky, Stephen H., 216-217
Leibowitz, Arnold H., 218-219
Leifer, Jacqueline C., 220
Lerman, Lisa G., 221
Lesnick, Howard, 222
Levin, Ronald M., 224, 223
Levinson, L. Harold, 20, 225-227
Lockhart, William J., 228-229
Lowenfeld, Andreas F., 230
Lubbers, Jeffrey S., 231-243, 385
Luneburg, William V., 244-247
Lyons, William, 393
Macey, Jonathan R., 248
Mackenzie, G. Calvin, 409
Madden, Thomas J., 249-250
Malloy, Michael P., 251-252
Mariner, Wendy K., 253
Martin, David A., 254-255
Martin, Peter W., 256
Martin, Philip, 255
Mashaw, Jerry L., 257-261, 376, 404
Mason, Malcolm S., 9, 262-263
McGarity, Thomas O., 264-268
McGowan, Carl, 269
McGregor, John, 270
Meidinger, Errol, 84, 271
Merrill, Richard A., 272-273
Michael, Douglas C., 274-276
Mikva, Abner J., 405
Miller, Geoffrey P., 248
Miller, Nancy G., 15, 243
Millhauser, Marguerite S., 28
Mintz, Benjamin W., 15
Morgan, Thomas D., 29, 277-281
Mullins, Morell E., 21, 282
Murphy, Arthur W., 283
Nafziger, James A. R., 284
Nathanson, Nathaniel L., 285-286
Neeley, Alfred S., IV, 288
North, David S., 289
Nyhart, J. D., 106
Ogden, Gregory L., 290
O'Reilly, James T., 291
Paglin, Max D., 292
Park, Robert E., 293, 294
Payton, Sallyanne, 419
Perritt, Henry H., Jr., 295-299
Pierce, Richard J., Jr., 300-301, 385
Popkin, William D., 302
Portz, Anna Mary, 289
Pou, Charles, Jr., 28, 128, 175, 303-306
Powell, Burnele V., 307, 308
Price, Monroe E., 110, 309
Pritzker, David M., 26, 310-313

Rabin, Robert L., 314
Revesz, Richard L., 147, 209
Rich, Malcolm C., 316
Riggs, Douglas A., 317
Riskin, Leonard L., 318
Roberts, Robert N., 29, 319
Robertson, Reuben B., 320
Robinson, Glen O., 321-322
Robinson, William F., Jr., 164
Rochvarg, Arnold, 323
Rosenblum, Victor G., 324-326
Rotunda, Ronald D., 327
Ruhlen, Merritt, 20
Ruttinger, George D., 328
Sargentich, Thomas O., 203, 329, 416
Scalia, Antonin, 330-331
Schlesinger, Steven R., 332
Schotland, Roy A., 333
Schuck, Peter H., 334-336
Schwartz, Teresa M., 337-338
Schwartz, Warren F., 339
Scott, Kenneth E., 340-341
Shane, Peter N., 342
Shannon, Brian D., 343
Shapiro, Sidney A., 267-268, 344-347
Shaw, William R., 348
Shoenberger, Allen E., 349
Siemer, Deanne C., 29, 409
Singer, Michael J., 350
Smith, Loren A., 351-354
Smith, Stuart A., 355
Smythe, Marianne K., 356
Sofaer, Abraham D., 357
Spritzer, Ralph S., 358
Stanton, Thomas H., 359
Starr, Kenneth W., 405
Steadman, John M., 360
Steinberg, Ann, 361
Stevenson, Russell B., Jr., 362-363
Stewart, Richard B., 411
Stockton, Diane M., 40
Strauss, Peter L., 364-365
Sullivan, Charles A., 402
Sullivan, Neil J., 366
Susman, Thomas M., 203
Suter, Alice H., 346
Szanton, Peter L., 367
Thomas, Larry, 393
Thomas, Larry W., 368
Thomas, Norman C., 369
Tobias, Carl W., 370
Tomlinson, Edward A., 371-376
Vaughns, Katherine L., 377
Verkuil, Paul R., 378-385
Vetter, Jan, 386
Vining, G. Joseph, 387
Vladeck, David C., 203
Wald, Patricia M., 416
Walsh, William J., 313
Wang, Theodore Hsien, 336
Ware, Leland, 388
Warfield, Wallace, 389
Weaver, Russell L., 390
Welborn, David M., 392-393
White, Martin B., 394
Williams, Jerre S., 395
Williams, Stephen F., 396
Willrich, Mason, 397
Wozencraft, Frank M., 398
Wright, Ronald F., 399
Zengerle, Lynda S., 401
Zeppos, Nicholas S., 213
Zimmer, Michael J., 402

☆ U.S. GOVERNMENT PRINTING OFFICE: 1995 – 401 - 310 / 40374